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2600
No. 12677

United States
Court of Appeals
for the Ninth Circuit.

KAM KOON WAN, on His Own Behalf and on
Behalf of All Other Persons and Employees
of Defendant Who Are Similarly Situated,
Appellant,

vs.

E. E. BLACK, LTD., a Hawaiian Corporation,
Appellee.

Transcript of Record

**Appeal from the United States District Court,
Territory of Hawaii.**

FILED

NOV - 3 1950

PAUL P. O'BRIEN,
CLERK

No. 12677

**United States
Court of Appeals
for the Ninth Circuit.**

**KAM KOON WAN, on His Own Behalf and on
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States Court of Appeals
for the Ninth Circuit

No. 12,677

KAM KOON WAN, et al.,

Appellants,

vs.

E. E. BLACK, LTD., a Hawaiian Corporation,
Appellee.

STIPULATION RE RECORD ON APPEAL

It is hereby stipulated and agreed by and between the parties through their respective attorneys as follows:

1.

That the above cause be submitted upon the briefs, argument and the printed record in Kam Koon Wan, et al., Appellants, v. E. E. Black, Appellee, No. 12,677, in this Court, and such supplemental record as may be approved by the Court.

2.

That in addition to the printed record referred to in (1) above, a supplemental record be printed contained the following items:

(a) Motion for leave to amend complaint and order allowing amendment filed June 23, 1950;

(b) Stipulation re amended complaint filed June 23, 1950;

In the United States Court of Appeals
for the Ninth Circuit

No. 12,677

KAM KOON WAN, et al.,

Appellants,

vs.

E. E. BLACK, LTD., a Hawaiian Corporation,
Appellee.

STIPULATION RE RECORD ON APPEAL

It is hereby stipulated and agreed by and between the parties through their respective attorneys as follows:

1.

That the above cause be submitted upon the briefs, argument and the printed record in Kam Koon Wan, et al., Appellants, v. E. E. Black, Appellee, No. 12,677, in this Court, and such supplemental record as may be approved by the Court.

2.

That in addition to the printed record referred to in (1) above, a supplemental record be printed contained the following items:

(a) Motion for leave to amend complaint and order allowing amendment filed June 23, 1950;

(b) Stipulation re amended complaint filed June 23, 1950;

(c) Findings of Fact and Conclusions of Law filed June 23, 1950;

(d) Judgment filed June 23, 1950;

(e) All minute orders and docket entries of the District Court in the above cause dated June 23, 1950; and

(f) Notice of Appeal filed July 11, 1950.

Dated: Honolulu, Hawaii, August 7, 1950.

/s/ SAMUEL LANDAU,
Attorney for Appellants.

/s/ J. GARNER ANTHONY,
Attorney for Appellee.

So Ordered:

/s/ CLIFTON MATHEWS,

/s/ HOMER T. BONE,
United States Circuit Judges.

[Endorsed]: Filed U.S.C.A. September 12, 1950.

In the United States District Court
for the Territory of Hawaii

Civil No. 672

KAM KOON WAN, on His Own Behalf and on
Behalf of All Other Persons and Employees
of Defendant Who Are Similarly Situated,

Plaintiffs,

vs.

E. E. BLACK, LTD., a Hawaiian Corporation,
Defendant.

STIPULATION RE AMENDED COMPLAINT

It is hereby stipulated and agreed by and between the parties through their respective attorneys that the complaint as amended shall be effective as of the date the original complaint was filed and that all pleadings filed subsequent to the original complaint, such as Answers, Motions to Intervene, Motion for Summary Judgment, Ruling Upon Motion for a Partial Summary Judgment, F. R. C. P., Motion for Rehearing, Stipulation, and the Ruling Upon Coverage Pursuant to Stipulation, shall re-

main in full force and effect and effective as though filed subsequent to the Amended Complaint.

Dated: Honolulu, T. H., this 23rd day of June, 1950.

/s/ SAMUEL LANDAU,
Attorney for Plaintiffs.

/s/ J. GARNER ANTHONY,
Attorney for Defendant.

Approved June 23, 1950.

/s/ J. F. McLAUGHLIN.

[Endorsed]: Filed June 23, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on to be heard on motion for summary judgment on September 12, 1947, and the court having issued a ruling upon motion for a partial summary judgment on February 5, 1948, and the parties through their respective counsel having filed on May 18, 1948, a stipulation describing the work performed by defendant between November 14, 1939, and December 7, 1941, and the court on August 12, 1948, having issued a ruling as to which of the jobs described in said stipulation were covered by the Fair Labor Standards Act of 1938, as amended, and a hearing having been held on January 14, 1949, and evidence having been adduced with respect to the work done by each of

the plaintiffs herein for defendant during the period November 14, 1939, to December 7, 1941, on jobs described in the ruling of August 12, 1948, as being covered by the Fair Labor Standards Act of 1938, as amended, and evidence having been adduced also with respect to the hours of work and rates of pay of plaintiffs during the aforesaid period of time on said jobs;

Now, Therefore, the court makes the following:

Findings of Fact

I.

On the dates and during all the times herein mentioned, defendant E. E. Black, Ltd., was and now is a corporation organized and doing business under the laws of the Territory of Hawaii, having its principal office and place of business at Honolulu, Territory of Hawaii.

II.

During the 6-year period next preceding the commencement of this action and for varying periods of time plaintiffs were employed by defendant.

III.

From and after November 10, 1943, until the date of the commencement of this action, those plaintiffs who were employed by defendant were paid according to the rates of pay prescribed by the Fair Labor Standards Act of 1938 as amended, as more fully set forth in the ruling upon motion for a partial

summary judgment issued by this court on February 5, 1948.

IV.

From and after December 7, 1941, and until November, 1943, such of the plaintiffs as were employed by defendant were paid according to rates of pay prescribed by orders of the military governor of Hawaii. Defendant was subject to the said orders of the military governor and paid its then employees in good faith in conformity with and in reliance upon such orders, all as more fully set forth in ruling upon motion for a partial summary judgment dated February 5, 1948.

V.

For the period November 14, 1939, to December 7, 1941, defendant performed the following jobs which were held to be covered by the Fair Labor Standards Act of 1938 as amended, in the ruling upon coverage, pursuant to stipulation entered herein on August 12, 1948:

(1) Addition to the Federal Building (Hilo Post Office) in Hilo, Hawaii.

(2) A short new road at Waimea, Kauai.

(3) A new bridge across a swamp at Kailua, Oahu.

(4) Relocation of main Island of Molokai highway.

(5) A new Ewa to Waipahu road, a Federal Aid Project, Oahu.

(6) Repairs made to Pier 18 in Honolulu, Harbor, Oahu.

(7) For the Hawaiian Pineapple Company, Ltd., at Honolulu, Oahu:

(a) Grading of a lot adjacent to Warehouse;

(b) Construction of overpass over railroad tracks;

(c) Filling and grading of area used for boxes used in hauling pineapples;

(d) Filling and grading of warehouse premises;

(e) Construction of 51 automobile car stalls;

(f) Construction of overpass bridge for conveying fruit;

(g) Paving yard area and roadway for unloading and conveyer system;

(h) Maintenance and repair of lug box area—moving of old shed;

(i) Covering of cafeteria floor with mastipav.

(8) Extension of Pier 29, Honolulu Harbor, Oahu, by constructing new wharf and shed for Inter-Island Steam Navigation Company.

(9) Alterations to building of Tropical Frosted Foods, Ltd. (Oahu), processors of mixed fruit juices, some of which were exported to mainland.

(10) Construction of new 12-inch tanker to storage tank supply line for Union Oil Company, Oahu.

VI.

The following named plaintiffs were employed by defendant during all or part of the period from November 14, 1939, to December 7, 1941; on one or more of the above-listed jobs found to be covered by the Fair Labor Standards Act of 1938 as amended:

Raymond Au, aka* Raymond Y. T. Au
Cornelio I. Aagsalog, aka Cornelio L. Aagsalog
Edward Apana
Teofilo Barluado, aka Teofilo Barluada
Francisco David, aka Francisco V. David
Clarence J. Freitas
Joseph Freitas, aka Joe Freitis
Sadamu Fujikawa
Sueki Fujikawa
Rosendo C. Gasparang
Peter Akuna Goo
Robert Gouveia, aka Robert Noah Gouveia
Arthur K. Ho, aka Arthur K. Hoe
Tokio Ige
Kim Sew Ing, aka K. S. Ing
Noboru Inouye
Hiroshi Kagawa
George H. Kahanu
Solomon Kailihiwa, aka Solomon H. Kailihiwa
Shigeo Kakumitsu, aka Srigeo Kakumitsu
Daniel Kaleikini
Seichi Katsuyoshi

*“aka” used herein is an abbreviation for “also known as.”

Yoshio Kawakami
Raymond Leopoldo
Martin Lopes
Masanobu Maeshiro
Katsumi Matsuda, aka Bob K. Matsuda
Tsuguo Matsunobu
Bert Mitsunaga, aka Bert S. Mitsunaga
Shiro Nakamura
Takeo Nishikawa, aka Takao Nishikawa
Manuel Ornalles, aka Manuel Ornellas
Joseph J. Perreira, aka Joseph James Perreira
Andres Ressoriction, aka Andres J. Ressoriction
E. S. Rose, aka Eddie S. Rose
Yoshitoyo Sakamoto
Juan Slazor, aka Juan Salazar
Yoshito Shigemura, aka Yoshijo Shigemura
Harold Y. Shito
Alfred P. Soares
John M. Soares
Frank Souza
Masaji Joseph Taniguchi, aka Joseph M. Taniguchi
Arthur M. Tavares, aka A. M. Tavares
Shochi Tokita, aka Shoichi Tokita
Flemmino Tomayo, aka Felomeno O. Tomayo
Kunihoshi Yamada, aka K. Yamada
Masao Yonemura, aka Stanley M. Yonemura

VII.

The remaining plaintiffs other than those listed in Finding VI above either were not employed by defendant during the period November 14, 1939, to December 7, 1941, or if they were employed they

worked on jobs found to be not covered by the Fair Labor Standards Act of 1938 as amended in the Ruling Upon Coverage Pursuant to Stipulation entered herein on August 12, 1948.

VIII.

As to the plaintiffs listed in Finding VI above, their recovery is limited to the amounts set after their names in Paragraph IV of the Conclusions of Law hereinafter set forth for the reason that if during the period November 14, 1939, to December 7, 1941, they were employed by the defendant on jobs other than those for which recovery is granted, they worked on jobs found to be not covered by the Fair Labor Standards Act of 1938 as amended in the Ruling Upon Coverage Pursuant to Stipulation entered herein on August 12, 1948.

Conclusions of Law

I.

From and after November 10, 1943, until the date of the commencement of this action, defendant did not violate the Fair Labor Standards Act of 1938 as amended because the hours of work and rates of pay of its employees were established in conformity with the standards prescribed by said act.

II.

From and after December 7, 1941, and until November 10, 1943, defendant failed to pay its employees according to the standards prescribed by

the Fair Labor Standards Act of 1938 as amended, but defendant did pay its employees during that period pursuant to standards established by the military governor of Hawaii applicable to it. Said military governor was an "agency of the United States" within the meaning of Section 9 of the Portal-to-Portal Pay Act of 1947, 29 U.S.C. Section 258, and the military orders governing the hours of work and rates of pay of defendant come within the meaning of the terms "regulation, order, ruling, approval, or interpretation" in said act.

III.

Having found upon undisputed affidavits that defendant acted in good faith, in conformity with the orders of the military governor, in determining the hours of work and rates of pay of its employees for the period December 7, 1941, to November 10, 1943, the court concludes that defendant has, under Section 9 of the Portal-to-Portal Pay Act of 1947, pleaded and proven a defense to the suit brought by plaintiffs with respect to such period for failure to pay its employees pursuant to the standards set forth in the Fair Labor Standards Act of 1938 as amended.

IV.

During the period November 14, 1939, to December 7, 1941, defendant violated the Fair Labor Standards Act of 1938, as amended, by failing to pay its employees according to the standards prescribed by said act, and the following-named plaintiffs who worked on jobs found to be in interstate

commerce, or the production of goods for commerce, within the meaning of the Fair Labor Standards Act of 1938 as amended, are entitled to recover from defendant the amounts set forth opposite their names for overtime pay and penalties under said act:

Raymond Au, aka Raymond Y. T. Au.....	\$ 74.90
Cornelio I. Agsalog, aka Cornelio L. Agsalog	5.50
Edward Apana	74.88
Teofilo Barluado, aka Teofilo Barluada.....	2.40
Francisco David, aka Francisco V. David...	6.00
Clarence J. Freitas.....	4.26
Joseph Freitas, aka Joe Freitas.....	11.56
Sadamu Fujikawa90
Sueki Fujikawa	9.90
Rosendo C. Gaspang.....	2.76
Peter Akuna Goo.....	485.74
Robert Gouveia, aka Robert Noah Gouveia.	30.62
Arthur K. Ho, aka Arthur K. Hoe.....	86.28
Tokio Ige	10.50
Kim Sew Ing, aka K. S. Ing.....	15.00
Noboru Inouye	779.80
Hiroshi Kagawa	6.80
George H. Kahanu.....	72.26
Solomon Kailihiwa, aka Solomon H. Kaili- hiwa	11.90
Shigeo Kakumitsu, aka Srigeo Kakumitsu..	55.20
Daniel Kaleikini	9.76
Seichi Katsuyoshi	4.82
Yoshio Kawakami	7.60

Raymond Leopoldo	76.86
Martin Lopes	3.00
Masanobu Maeshiro	2.50
Katsumi Matsuda, aka Bob K. Matsuda.....	6.80
Tsuguo Matsunobu	2.76
Bert Mitsunage, aka Bert S. Mitsunaga	231.66
Shiro Nakamura	5.00
Takeo Nishikawa, aka Takao Nishikawa...	3.50
Manuel Ornalles, aka Manuel Ornellas.....	35.34
Joseph J. Perreira, aka Joseph James Per- reira	12.02
Andres Ressoriction, aka Andres J. Ressor- riction	4.00
E. S. Rose, aka Eddie S. Rose.....	234.18
Yoshitoyo Sakamoto	9.00
Juan Slazor, aka Juan Salazar.....	28.98
Yoshito Shigemura, aka Yoshijo Shigemura.	21.20
Harold Y. Shito.....	436.08
Alfred P. Soares.....	15.40
John M. Soares.....	11.56
Frank Souza	15.46
Masaji Joseph Taniguchi, aka Joseph M. Taniguchi	138.12
Arthur M. Tavares, aka A. M. Tavares	20.50
Shochi Tokita, aka Shoichi Tokita.....	5.00
Flemmino Tomayo, aka Felomeno O. Tomayo	1.66
Kunihoshi Yamada, aka K. Yamada.....	70.74
Masao Yonemura, aka Stanley M. Yone- mura	120.42

V.

The remaining plaintiffs herein not having been employed by defendant in interstate commerce or in the production of goods for commerce during the period November 14, 1939, to December 7, 1941, are not entitled to recover anything from the defendant; and the plaintiffs listed in Conclusion IV as hereinabove set forth not having been employed by defendant in interstate commerce or in the production of goods for commerce during the period November 14, 1939, to December 7, 1941, except in those jobs found to be covered by the Fair Labor Standards Act of 1938 as amended, in the Ruling Upon Coverage Pursuant to Stipulation entered herein on August 12, 1948, are not entitled to recover anything from the defendant except as shown in Conclusion IV above.

A judgment formulated in accordance with the findings and conclusions stated herein will be signed upon presentation.

Dated: Honolulu, T. H., June 23, 1950.

/s/ J. FRANK McLAUGHLIN,
Judge.

[Endorsed]: Filed June 23, 1950.

In the United States District Court
for the Territory of Hawaii

Civil No. 672

KAM KOON WAN, on His Own Behalf and on
Behalf of All Other Persons and Employees of
Defendant Who Are Similarly Situated,

Plaintiffs,

vs.

E. E. BLACK, LTD., an Hawaiian Corporation,
Defendant.

JUDGMENT

The above cause having come on for trial before the Court and the Court having heretofore determined upon a motion for summary judgment that the defendant was not liable to the plaintiff and the intervenors for work done subsequent to November 10, 1943, because wages were paid thereafter at the statutory rate prescribed by the Fair Labor Standards Act of 1938, and further that defendant was not liable for work done subsequent to December 7, 1941, because defendant paid plaintiff and intervenors in good faith and in conformity with and in reliance on the rulings of the Office of the Military Governor of the Territory of Hawaii and that such payments were in fact made in good faith and in reliance upon said rulings, regulations and orders and as a matter of law under Section 9 of the Portal-to-Portal Act (29 U.S.C. 258) constitute a defense

to the claims of plaintiff and intervenors herein for the period December 7, 1941, to and including November 10, 1943, and the Court having determined on the basis of stipulated facts which of the jobs performed prior to December 7, 1941, but within a period six years prior to the filing of the complaint herein were in interstate commerce, and the Court having found that the defendant is indebted to the following named intervenors in the amounts set forth below for overtime pay and penalties pursuant to the Fair Labor Standards Act of 1938, and a prior judgment entered herein on January 20, 1949, having been found not to be final for failure properly to name all parties therein;

Now, Therefore, It Is Ordered, Adjudged and Decreed:

(1) That the following-named intervenors have and recover of defendant the sums set opposite their respective names:

Raymond Au, a.k.a.* Raymond Y. T. Au ...	\$ 74.90
Cornelio I. Agsalog, a.k.a. Cornelio L. Agsalog	5.50
Edward Apana	74.88
Teofilo Barluado, a.k.a. Teofilio Barluada...	2.40
Francisco David, a.k.a. Francisco V. David.	6.00
Clarence J. Freitas.....	4.26
Joseph Freitas, a.k.a Joe Freitas.....	11.56

*“a.k.a.” used herein is an abbreviation for “also known as.”

Sadamu Fujikawa90
Sueki Fujikawa	9.90
Rosendo C. Gaspang.....	2.76
Peter Akuna Goo.....	485.74
Robert Gouveia, a.k.a. Robert Noah Gouveia.	30.62
Arthur K. Ho, a.k.a. Arthur K. Hoe.....	86.28
Tokio Ige	10.50
Kim Sew Ing, a.k.a. K. S. Ing.....	15.00
Noboru Inouye	779.80
Hiroshi Kagawa	6.80
George H. Kahanu.....	72.26
Solomon Kailihiwa, a.k.a. Solomon H. Kaili- hiwa	11.90
Shigeo Kakumitsu, a.k.a. Srigeo Kakumitsu.	55.20
Daniel Kaleikini	9.76
Seichi Katsuyoshi	4.82
Yoshio Kawakami	7.60
Raymond Leopoldo	76.86
Martin Lopes	3.00
Masanobu Maeshiro	2.50
Katsumi Matsuda, a.k.a. Bob K. Matsuda...	6.80
Tsuguo Matsunobu	2.76
Bert Mitsunage, a.k.a. Bert S. Mitsunaga..	231.66
Shiro Nakamura	5.00

Takeo Nishikawa, a.k.a. Takao Nishikawa...	3.50
Manuel Ornalles, a.k.a. Manuel Ornellas....	35.34
Joseph J. Perreira, a.k.a. Joseph James Perreira	12.02
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Yoshitoyo Sakemoto	9.00
Juan Slazor, a.k.a. Juan Salazar.....	28.98
Yoshito Shigemura, a.k.a. Yoshijo Shige- mura	21.20
Harold Y. Shito.....	436.08
Alfred P. Soares.....	15.40
John M. Soares.....	11.56
Frank Souza	15.46
Masaji Joseph Taniguchi, a.k.a. Joseph M. Taniguchi	138.12
Arthur M. Tavares, a.k.a. A. M. Tavares...	20.50
Shochi Tokita, a.k.a. Shoichi Tokita.....	5.00
Flemmino Tomayo, a.k.a. Felomeno O. Tomayo	1.66
Kunihoshi Yamada, a.k.a. K. Yamada.....	70.74
Masao Yonemura, a.k.a. Stanley M. Yone- mura	120.42

(2) That the plaintiff, Kam Koon Wan and the following intervenors herein have and recover nothing in this action, to wit:

Kam Koon Wan

Aquilino Aboc

Takeshi A. Adachi, a.k.a. Takeshi Adachi

George J. Ajimine, a.k.a. George Ajimine

Yoshiji Aoki

Toshio Arakaki

Genichi Asato

Kenye Asato

Yeisei Asato

Robert Awakuni, a.k.a. Robert J. Awakuni

Zacarias Barago

Simeon M. Batoon, a.k.a. Simeon Macabasog Batoon

Maximo Baquiden, a.k.a. Maximo E. Baquioen

Daniel C. Bayaca

Chrisanto Bolilan, a.k.a. Crisanto Bolilan

Guillermo Boylan, a.k.a. Guillermo D. Baylon

Alberto Buscato

Feliciano Cabais, a.k.a. Feliciano C. Cabais

Eusebio Cadavis, a.k.a. Eusebio C. Cadavis

James N. Cain, a.k.a. James Norton Cain

Julian Calano, a.k.a. Julian B. Calano

Robert Masaru Chagami, a.k.a. Masaru R. Chagami

Raphael Kalahoano Christ, a.k.a. Raphael K.

Christ, Jr.

V. Colona, a.k.a. Victoriano N. Coloma

Juan Cube, a.k.a. Juan C. Cube

Constancio Cui

Damaso B. Dacutan, a.k.a. Damaso Dacatan

Cipriano Dela Cruz, a.k.a. Cipriano C. Dela Cruz

Eulogio Dela Cruz

P. Dela Cruz, a.k.a. Pedro Pio Dela Cruz

William De Silva

Vicente G. Cocosin, a.k.a. Vincente G. Docosin

Esidro Doguman, a.k.a. Esidro Daguman

P. L. Domingo, a.k.a. Pedro T. Domingo

Baldomero P. Dumlao, a.k.a. Baldomero Dumlao

Frank B. Enos, a.k.a. F. B. Enos

Rufo Espirito, a.k.a. Rufo Espiritu

Feliciano Fabian, a.k.a. Feliciano P. Fabian

E. Fernandez, a.k.a. Edward R. Fernandez

L. G. Fernandez, a.k.a. Lawrence J. Fernandez

Manuel Fernandez, a.k.a. Manuel J. Fernandes

William H. K. Fong

George Fonseca, a.k.a. George Fonsica

Liborio T. Francisco, a.k.a. Liborio Francisco

Bert K. Fuchigami

S. Fujimoto

Yoshio Fujinaga

Yoshimi Fujiwara

Shoso Fukuhara

Tamotsu Fujioka, a.k.a. Tamotsu Fukuoka

Tsuruo Fukuroku

J. K. Fukuya, a.k.a. Jerry Kazuo Fukuya

Saturnino J. Gahuman, a.k.a. Sturnini Gahuman

Benito A. Galon, a.k.a. Genito A. Galos

Tony Galtua

Isidoro Games, a.k.a. Isidro D. Gamas

Telesporo Ganigan, a.k.a. Telesfono Ganigan

Endelicio B. Ganir

Hipolito D. Gombio

Frank Gonsalves
Hisao Goto
Joseph Gouveia
Manuel Gouveia
Noboru Gushikuma
Felia Gutierrez, a.k.a. Gelix Gutierrez
Roberto Daneel Guting
Isao Hamada
Ichiro Harada
Gus Sadami Hoshimoto, a.k.a. Gus S. Hashimoto
James Junichi Hashimoto, a.k.a. James J. Hashimoto
Jiro Higa
Seimei Higa
Tadanobu Higa
Tamotsu Higa
Tokuyei Higa
Tokuzen Higa
Kazuo Higuchi
Ralph Jichi Hirai, a.k.a. Juichi Ralph Hirai
Riichi Hirano
Shigeru Hirashima
Richard K. Horikawa
Seichi Ige
E. Inis, a.k.a. Eutiquiano M. Inis
Masato Inouye
Yoshio Inouye
Kiyotake Ishitani
Edward Isamu Ito, a.k.a. Edward I. Ito
Keisuke Iwata, a.k.a. Keisuke Iwate
Hajime Izumi
E. Jike, a.k.a. Ekiso Jike or Jike Ekiso

Wm. K. Jones, a.k.a. William K. Jones

Salvator Jordano, a.k.a. Salvatore Jordano, Sr.

Raymond Y. Kagihara

Charles P. Kailihiwa, Sr., a.k.a. Charles P. Kailihiwa

R. M. Kaiura, a.k.a. Ralph M. Kaiura

Shigeto Kamada

Sueo Kawakami

Shigejiro Kaya

David E. Kihei, a.k.a. D. E. Kihie

M. Kimura, a.k.a. Minoru Kimura

William K. Kipapa

Kisei Kobashigawa, a.k.a. Kisei Kobashikawa

Kenzo Koshiyama, a.k.a. Kenso Koshiyama

Harold K. Kubota

Ronald Kunishige, a.k.a. Sakae Kunishige

Pedro D. Lacno

Quon Wo Leong

Raymond B. Lopes

Mack Hong Lum

M. Macadangdang, a.k.a. Manuel Macadangdang

George Machado

Manuel Machado

J. T. Maeda, a.k.a. Takematsu Maeda

Tatsuo Maeda

Suenobu Makino

Walter K. Makino

Juan Mapano

Clemente M. Martin

Hajime Masanori, a.k.a. Masanori Hajime

Shunichi Masuda, a.k.a. Shinichi Masuda

G. K. Matsumori, a.k.a. George K. Matsumori

Thomas Hideo Matsunaka, a.k.a. H. Matsunaka
Davie K. Matton, a.k.a. Davis K. Mattoon
Henry A. May, a.k.a. Heuay A. May
Guy McNeal, Jr., a.k.a. Guy McNeil
George Philip Mendes, a.k.a. George P. Mendes
Antonio P. Mesquita
Louis Miguel
Nio Miyasato
Sadao Miyashiro
Nolan M. Miyazaki, a.k.a. Nonal M. Miyazaki
Y. Mizota, a.k.a. Yoshio Mizota
Fumio Mori
Masao Mori
Hector P. Morton, Jr., a.k.a. Hector R. Morton, Jr.
Yoshio Mugao
Itsuo Muneoka
Yutaka Muneoka
Sachio Murakami
Naoto Murakawa
Sunao T. Nabeshima, a.k.a. Thomas S. Nabeshima
Edward Naehu, a.k.a. Edward K. Naehu
Alfonzo D. Nagal, a.k.a. Alfongo W. Nagal
Sakaru Naganuma
Charles Nakagawa, a.k.a. Charles H. Nakagawa
Shinkatsu Nakamine, a.k.a. Charles S. Nakamine
Sonsuke Nakamura, a.k.a. Raymond S. Nakamura
Sueo Nakamura
Kiyoto Nakanishi
Eddie Nakata, a.k.a. Edward H. Nakata
Pablo S. Nano, a.k.a. Pablo Nano
Bonifacio Nanozo, a.k.a. Bonifacio M. Nanozo
Edwin F. Neves, a.k.a. Edwin Neves

Gualberto Nicholas, a.k.a. Gualberto P. Nicolas
Paul Nishi, a.k.a. Paul N. Nishi
Philip Koso Nishikawa, a.k.a. Koso Nishikawa
S. Nitta, a.k.a. Susumu Nitta
George Nobriga, a.k.a. George C. Nobriga
Raymond Tadasato Noji, a.k.a. Ladasato R. Naji
Larry Teruo Nosaka, a.k.a. Larry T. Nosaka
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J. Paco, a.k.a. Julian Paco
Harry Papke
Marcelo Pequero
Julia Peres, a.k.a. Julian Peres
Marion Perry
Harry D. Peterson
William Pililaau, Jr.

Elsworth Place
Severo Primero
Edward Ramos
Gregorio Recalde
P. Ricona, a.k.a. Porfirio Ricona
Geronimo Pata Rojas
Simeon M. Sagnep
Takeshi Saifuka
Eugene Sakada, a.k.a. Eugene Y. Sakoda
George Sakata
H. Sakata, a.k.a. Miles H. Sakata
Edward Leslie Sanderson, a.k.a. Edward L. Sanderson
Andrew P. Sardinha
Satoshi Sasaki, a.k.a. Stoshi Sasaki
G. Sato, a.k.a. Goichi Sato
Leoncio Sayson, a.k.a. Leoncio A. Sayson
Hiroshi Shichida
S. Shimabukuro, a.k.a. Sume Shimabukuro
Noriyoshi Shimahara
Kenneth H. Shioi
Suguru Shishido, a.k.a. Suguro Shishido
Cornelio Signangote, a.k.a. Cornelio Sinangote
William K. Simmons
Teodoro Sismar
Louis Soares
James K. Sogara
Antonio Sonico
Fred Strohlin, a.k.a. Fred L. Strohlin
Toshiyuki Suematsu
Sakai Sugimoto
A. Suguitan, a.k.a. Albaro P. Suguitan

Nicolas E. Sumbad

Manuel G. Sylva

Shigeo Harold Tabata, a.k.a. Shigeo Tabata

Silvino Tabilisma, a.k.a. Silvino V. Tabilisma

Tranquilino A. Tacla

Takeshi Takabayashi

Edward Z. Takahashi

H. Takizawa, a.k.a. Hirakazu Takizawa

Robert Tamashiro, a.k.a. Robert S. Tamashiro.

Lloyd Jitsuma Tamura, a.k.a. Floyd J. Tamura

T. Tamura, a.k.a. Tadashi Tamura

Katsuji Tanaka

Timoteo Tantal, a.k.a. Timoteo T. Tantal

Abraham Tavares, a.k.a. Abraham A. Tavares

Honorato H. Timateo, a.k.a. Honorato H. Timoteo

Graciano Tinaho, a.k.a. Graciano Maluno Tinaja

Takao Togami

Ted Tokushige

Flaviano Olep Tolentino, a.k.a. Flaviano Tolintino

Yokichi Toma

Sebastian Tomboc, a.k.a. Sebastian B. Tomboc

Alejandro Torres, a.k.a. Alejandro Allingag Torres

Robert S. Toyama

E. Tradio, a.k.a. Eddie Tradio

Isami Tsuzuki, a.k.a. Isamu Tsuzuki

Lucas Tumamao, a.k.a. Lucas V. Tumamao

Robert S. Ueoka

Robert Uno, a.k.a. Sunao R. Uno

Julio N. Valdez, a.k.a. Julio Naranjo Valdez

Pedro Valdez, a.k.a. Pedro B. Valdez

Gordon G. Van Alst, a.k.a. Gordon Van Ald

Joseph Vieira

Shigetoshi Wachi

Mike M. Washiashi, a.k.a. Mike Washiashi

Clayton Wise, a.k.a. Clayton A. Wyse

Clifford Wong, a.k.a. Clifford A. C. Wong

Henry M. Wong, a.k.a. Henry N. Wong

Samuel T. Wright, a.k.a. Samuel Wright

Richard Masao Yamada

Masaru Yamamoto

Masaru Yamamoto

Sadao Yamasaki

Masatoshi Yamauchi

Y. Yasutaki, a.k.a. Henry Y. Yasutaki

Shinsi Yogi, a.k.a. Shinji Yogi

Kazumi N. Yokoyama, a.k.a. Nelson K. Yokoyama

Suewo Yoshida

Melvin M. Zuzui

(3) That defendant shall pay costs in the sum of \$26.50 and attorney's fee in the sum of \$1500;

(4) That defendant, in satisfaction of this judgment, may pay the aforesaid sums due less withholding taxes as to sum payable to intervenors to the clerk of court for distribution to the respective parties entitled thereto.

Dated: Honolulu, Hawaii, June 23, 1950.

/s/ J. FRANK McLAUGHLIN,
District Judge.

[Endorsed]: Filed June 23, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the following:

Kam Koon Wan

Raymond Au, a.k.a.* Raymond Y. T. Au

Cornelio I. Agsalog, a.k.a. Cornelio L. Agsalog

Edward Apana

Teofilo Barluado, a.k.a. Teofilo Barluada

Francisco David, a.k.a. Francisco V. David

Clarence J. Freitas

Joseph Freitas, a.k.a. Joe Freitas

Sadamu Fujikawa

Sueki Fujikawa

Rosendo C. Gaspang

Peter Akuna Goo

Robert Gouveia, a.k.a. Robert Noah Gouveia

Arthur K. Ho, a.k.a. Arthur K. Hoe

Tokio Ige

Kim Sew Ing, a.k.a. K. S. Ing

Noboru Inouye

Hiroshi Kagawa

George H. Kahanu

Solomon Kailihiwa, a.k.a. Solomon H. Kailihiwa

Shigeo Kakumitsu, a.k.a. Srigeo Kakumitsu

Daniel Kaleikini

Seichi Katsuyoshi

Yoshio Kawakami

Raymond Leopoldo

Martin Lopes

Masanobu Maeshiro

* "a.k.a." used herein is an abbreviation for "also known as."

Katsumi Matsuda, a.k.a. Bob K. Matsuda
Tsuguo Matsunobu
Bert Mitsunage, a.k.a. Bert S. Mitsunaga
Shiro Nakamura
Takeo Nishikawa, a.k.a. Takao Nishikawa
Manuel Ornelles, a.k.a. Manuel Ornellas
Joseph J. Perreira, a.k.a. Joseph James Perreira
Andres Ressuriction, a.k.a. Andres J. Ressuriction
E. S. Rose, a.k.a. Eddie S. Rose
Yoshitoyo Sakamoto
Juan Slazor, a.k.a. Juan Salazar
Yoshito Shigemura, a.k.a. Yoshijo Shigemura
Harold Y. Shito
Alfred P. Soares
John M. Soares
Frank Souza
Masaji Joseph Taniguchi, a.k.a. Joseph M. Taniguchi
Arthur M. Tavares, a.k.a. A. M. Tavares
Shochi Tokita, a.k.a. Shoichi Tokita
Flemmino Tomayo, a.k.a. Felomeno O. Tomayo
Kunihoshi Yamada, a.k.a. K. Yamada
Masao Yonemura, a.k.a. Stanley M. Yonemura
Aquilino Aboc
Takeshi A. Adachi, a.k.a. Takeshi Adachi
George J. Ajimine, a.k.a. George Ajimine
Yoshiji Aoki
Toshio Arakaki
Genichi Asato
Kenye Asato
Yeisei Asato
Robert Awakuni, a.k.a. Robert J. Awakuni

Zacarias Barago

Simeon M. Batoon, a.k.a. Simeon Macabasog Batoon

Maximo Baquiden, a.k.a. Maximo E. Baquioen

Daniel C. Bayaca

Chrisanto Bolilan, a.k.a. Crisanto Bolilan

Guillermo Boylan, a.k.a. Guillermo D. Baylon

Alberto Buscato

Feliciano Cabais, a.k.a. Feliciano C. Cabais

Eusebio Cadavis, a.k.a. Busebio C. Cadavis

James N. Cain, a.k.a. James Norton Cain

Julian Calano, a.k.a. Julian B. Calano

Robert Masaru Chagami, a.k.a. Masaru R. Chagami

Raphael Kalahoano Christ, a.k.a. Raphael K. Christ,
Jr.

V. Colona, a.k.a. Victoriano N. Coloma

Juan Cube, a.k.a. Juan C. Cube

Constancio Cui

Damaso B. Dacutan, a.k.a. Damaso Dacatan

Cipriano Dela Cruz, a.k.a. Cipriano C. Dela Cruz

Eulogio Dela Cruz

P. Dela Cruz, a.k.a. Pedro Pio Dela Cruz

William De Silva

Vicente G. Cocosin, a.k.a. Vincente G. Docosin

Esidro Doguman, a.k.a. Esidro Daguman

P. L. Domingo, a.k.a. Pedro T. Domingo

Baldomero P. Dumlao, a.k.a. Baldomero Dumlao

Frank B. Enos, a.k.a. F. B. Enos

Rufo Espirito, a.k.a. Rufo Espiritu

Feliciano Fabian, a.k.a. Feliciano P. Fabian

E. Fernandez, a.k.a. Edward R. Fernandez

L. G. Fernandez, a.k.a. Lawrence J. Fernandez

Manuel Fernandez, a.k.a. Manuel J. Fernandes

William H. K. Fong
George Fonseca, a.k.a. George Fonsica
Liborio T. Francisco, a.k.a. Liborio Francisco
Bert K. Fuchigami
S. Fujimoto
Yoshio Fujinaga
Yoshimi Fujiwara
Shoso Fukuhara
Tamotsu Fujioka, a.k.a. Tamotsu Fukuoka
Tsuruo Fukuroku
J. K. Fukuya, a.k.a. Jerry Kazuo Fukuya
Saturnino J. Gahuman, a.k.a. Sturnini Gahuman
Benito A. Galon, a.k.a. Genito A. Galos
Tony Galtua
Isidoro Games, a.k.a. Isidro D. Gamas
Telesporo Ganigan, a.k.a. Telesfono Ganigan
Endelicio B. Ganir
Hipolito D. Gombio
Frank Gonsalves
Hisao Goto
Joseph Gouveia
Manuel Gouveia
Noboru Gushikuma
Felix Gutierrez, a.k.a. Gelix Gutierrez
Roberto Daneel Guting
Isao Hamada
Ichiro Harada
Gus Sadami Hoshimoto, a.k.a. Gus S. Hashimoto
James Junichi Hashimoto, a.k.a. James J. Hashi-
moto
Jiro Higa
Seimei Higa

Tadanobu Higa

Tamotsu Higa

Tokuyei Higa

Tokuzen Higa

Kazuo Higuchi

Ralph Jichi Hirai, a.k.a. Juichi Ralph Hirai

Riichi Hirano

Shigeru Hirashima

Richard K. Horikawa

Seichi Ige

E. Inis, a.k.a. Eutiquiano M. Inis

Masato Inouye

Yoshio Inouye

Kiyotake Ishitani

Edward Isamu Ito, a.k.a. Edward I. Ito

Keisuke Iwata, a.k.a. Keisuke Iwate

Hajime Izumi

E. Jike, a.k.a. Ekiso Jike or Jike Ekiso

Wm. K. Jones, a.k.a. William K. Jones

Salvator Jordano, a.k.a. Salvatore Jordano, Sr.

Raymond Y. Kagihara

Charles P. Kailihiwa, Sr., a.k.a. Charles P. Kaili-
hawa

R. M. Kaiura, a.k.a. Ralph M. Kaiura

Shigeto Kamada

Sueo Kawakami

Shigejiro Kaya

David E. Kihei, a.k.a. D. E. Kihie

M. Kimura, a.k.a. Minoru Kimura

William K. Kipapa

Kisei Kobashgawa, a.k.a. Kisei Kobashikawa

Kenzo Koshiyama, a.k.a. Kenso Koshiyama

Harold K. Kubota
Ronald Kunishige, a.k.a. Sakae Kunishige
Pedro D. Lacno
Quon Wo Leong
Raymond B. Lopes
Mack Hong Lum
M. Macadangdang, a.k.a. Manuel Macadangdang
George Machado
Manuel Machado
J. T. Maeda, a.k.a. Takematsu Maeda
Tatsuo Maeda
Suenobu Makino
Walter K. Makino
Juan Mapano
Clemente M. Martin
Hajime Masanori, a.k.a. Masanori Hajime
Shunichi Masuda, a.k.a. Shinichi Masuda
G. K. Matsumori, a.k.a. George K. Matsumori
Thomas Hideo Matsunaka, a.k.a. H. Matsunaka
Davie K. Matton, a.k.a. Davis K. Mattoon
Henry A. May, a.k.a. Heuay A. May
Guy McNeal, Jr., a.k.a. Guy McNeil
George Philip Mendes, a.k.a. George P. Mendes
Antonio P. Mesquita
Louis Miguel
Nio Miyasato
Sadao Miyashiro
Nolan M. Miyazaki, a.k.a. Nonal M. Miyazaki
Y. Mizota, a.k.a. Yoshio Mizota
Fumio Mori
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Hector P. Morton, Jr., a.k.a. Hector R. Morton, Jr.

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R. N. Oshiro, a.k.a. Robert N. Oshiro
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J. Paco, a.k.a. Julian Paco
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Marcelo Pequero
Julia Peres, a.k.a. Julian Peres
Marion Perry
Harry D. Peterson
William Pililaau, Jr.
Elsworth Place
Severo Primero
Edward Ramos
Gregorio Recalde
P. Ricon, a.k.a. Porfirio Ricon
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Takeshi Saifuku
Eugene Sakada, a.k.a. Eugene Y. Sakoda
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H. Sakata, a.k.a. Miles H. Sakata
Edward Leslie Sanderson, a.k.a. Edward L. Sanderson
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Satoshi Sasaki, a.k.a. Stoshi Sasaki

G. Sato, a.k.a. Goichi Sato
Leoncio Sayson, a.k.a. Leoncio A. Sayson
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Toshiyuki Suematsu
Sakai Sugimoto
A. Suguitan, a.k.a. Albaro P. Suguitan
Nicolas E. Sumbad
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Shigeo Harold Tabata, a.k.a. Shigeo Tabata
Silvino Tabilisma, a.k.a. Silvino V. Tabilisma
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Katsuji Tanaka
Timoteo Tantal, a.k.a. Timoteo T. Tantal
Abraham Tavares, a.k.a. Abraham A. Tavares
Honorato H. Timateo, a.k.a. Honorato H. Timoteo

Graciano Tinaho, a.k.a. Graciano Maluno Tinaja
Takao Togami
Ted Tokushige
Flaviano Olep Tolentino, a.k.a. Flaviano Tolintino
Yokichi Toma
Sebastian Tomboc, a.k.a. Sebastian B. Tomboc
Alejandro Torres, a.k.a. Alejandro Allingag Torres
Robert S. Toyama
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Isami Tsuzuki, a.k.a. Isamu Tsuzuki
Lucas Tumamao, a.k.a. Lucas V. Tumamao
Robert S. Ueoka
Robert Uno, a.k.a. Sunao R. Uno
Julio N. Valdez, a.k.a. Julio Naranjo Valdez
Pedro Valdez, a.k.a. Pedro B. Valdez
Gordon G. Van Alst, a.k.a. Gordon Van Ald
Joseph Vieira
Shigetoshi Wachi
Mike M. Washiashi, a.k.a. Mike Washiashi
Clayton Wise, a.k.a. Clayton A. Wyse
Clifford Wong, a.k.a. Clifford A. C. Wong
Henry M. Wong, a.k.a. Henry N. Wong
Samuel T. Wright, a.k.a. Samuel Wright
Richard Masao Yamada
Masaru Yamamoto
Masaru Yamamoto
Sadao Yamamoto
Sadao Yamasaki
Masatoshi Yamauchi
Y. Yasutaki, a.k.a. Henry Y. Yasutaki
Shinsi Yogi, a.k.a. Shinji Yogi
Kazumi N. Yokoyama, a.k.a. Nelson K. Yokoyama

Suewo Yoshida

Melvin M. Zuzui

plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this case on the 23rd day of June, 1950.

Dated: Honolulu, T. H., this 11th day of July, 1950.

SAMUEL LANDAU,

Attorney for Appellants above
named.

[Endorsed]: Filed July 11, 1950.

From the Minutes of the United States District
Court for the District of Hawaii

Friday, June 23, 1950

[Title of Court and Cause.]

ORDER

On this day came Mr. Samuel Landau, counsel for the plaintiffs herein, and also came Mr. J. Garner Anthony and Mr. Frank D. Padgett of the firm of Robertson, Castle & Anthony, counsel for the defendant herein.

The Court ordered upon stipulation of the respective parties that one principal shall be sufficient on the cost bond on appeal in the sum of \$250.00.

[Title of District Court and Cause.]

DOCKET ENTRIES

1945

Nov. 14—Filing Complaint for unpaid overtime compensation and unpaid minimum wages under the fair labor standards act. Issuing Summons, 1 certified copy Compl. & Summons for service.

Nov. 21—Filing Stipulation.

Dec. 7—Filing U. S. Marshal's return Summons.

1946

Jan. 9—Filing Stipulation.

Feb. 9—Filing Order.

Mar. 11—Filing Stipulation.

Mar. 26—Filing Stipulation.

Mar. 27—Filing Answer.

Filing Motion to Set.

Apr. 1—Entering proceedings hearing on motion—set for Trial May 2, 1946, at 9 a.m.

Apr. 8—Filing Motion to Intervene and Notice.

Apr. 10—Entering proceedings—motion to intervene—granted—Pre Trial Apr. 17, 1946.

Apr. 17—Entering proceedings at Pre Trial. Trial May 2, 1946, taken off calendar.

May 13—Filing Motion to Intervene and Notice.

May 17—Filing Stipulation.

1946

May 20—Entering proceedings—motion to intervene—granted.

June 3—Filing Motion to Intervene. Entering proceedings—motion to Intervene granted—defendant allowed to June 17, 1946, to answer.

June 6—Filing Stipulation.

July 6—Filing Stipulation.

July 17—Filing Stipulation.

Aug. 16—Filing Stipulation.

Oct. 1—Filing Stipulation.

Oct. 30—Filing Stipulation.

Dec. 2—Filing Stipulation.

1947

Jan. 10—Filing Stipulation.

Jan. 31—Filing Amended Answer.

Aug. 15—Filing Motion for leave to amend answer. Filing Notice. Filing Motion for Summary Judgment. Filing memorandum in support of Defendant's motion.

Aug. 25—Entering proceedings at hearing on motion to amend and on motion for summary judgment—motion to amend granted—To file new answer, motion for summary judgment set for hearing Sept. 10, 1947.

Aug. 26—Filing Second Amended Answer.

1947

Sept. 12—Entering proceedings at hearing on motion for summary judgment. Submitted—To file Briefs. Deft. 9-16-47, Plaintiff 10-1-47, Reply 10-10-47.

Sept. 17—Filing memorandum on behalf of defendant Re Act 174—SL. Hawaii 1945.

Oct. 2—Filing memorandum controverting defendant's motion for summary judgment.

Oct. 30—Filing Reply memorandum.

Nov. 20—Filing Supplemental memorandum.

1948

Feb. 5—Filing Ruling upon Motion for a Partial Summary Judgment F.R.C.P. 56(b) and (d).

Mar. 11—Filing Motion for Re-Hearing.

May 13—Entering proceedings at hearing on Motion—Denied. Entering proceedings at hearing on Pre Trial. Continued to 1:30 p.m. May 18, 1948, for further Pre Trial.

May 18—Entering proceedings at further Pre Trial hearing. Filing Stipulation.

May 26—Entering proceedings—at argument—submitted—to file memo by June 9, 1948.

June 9—Filing Memorandum. Filing memorandum re construction industry, etc.

1948

Aug. 12—Filing Ruling upon coverage Pursuant to Stipulation.

Nov. 17—Filing motion to set and notice.

Nov. 20—Entering proceedings hearing on motion—Set for Trial Dec. 14, 1948, at 2 p.m. Pre Trial Dec. 10, 1948, at 2 p.m.

Dec. 10—Entering proceedings Pre Trial conference—case taken off calendar, continued to Dec. 20, 1948, for entry of judgment.

Dec. 20—Entering Order Dec. 27, 1948, for judgment.

1949

Jan. 6—Entering proceedings—matter of judgment continued.

Jan. 14—Entering proceedings at hearing—Witness—John W. Stevens Exhibits Defts. 1 and 2—Judgments to be presented;

Jan. 20—Entering proceedings at Entry of Judgment. Filing Partial Summary Judgment (McLaughlin). Filing Judgment Entered at 1:30 p.m. 1-20-49.

Feb. 15—Filing Notice of Appeal. Filing Bond for Costs on Appeal. Copy notice mailed to Robertson, Castle & Anthony.

Feb. 16—Filing Reporter's Transcript of Proceedings.

1950

Feb. 17—Filing Designation of Record on Appeal.

Mar. 21—Filing Order Extending Time for Filing
Record on appeal and Docketing appeal.

Apr. 15—Forwarding Record on Appeal to Ninth
Circuit Court of Appeals.

May 2—Filing Transcript of Proceedings—Grain.

1950

Mar. 17—Filing certified copy Order, U. S. Court
of Appeals for the Ninth Circuit re Sup-
plemental record on appeal.

1950

Mar. 18—Forwarding Supplemental Record on Ap-
peal to Ninth Circuit Court of Appeals.

Apr. 6—Filing certified copy Order, U. S. Court
of Appeals for the Ninth Circuit re Sec-
ond Supplemental record on appeal.

Apr. 24—Filing Transcript of Proceedings Apr. 1,
10, May 20, 1946; September 12, 1947;
May 13 and 26, 1948.

Apr. 25—Forwarding Second Supplemental Record
on Appeal to Ninth Circuit Court of Ap-
peals.

June 23—Entering minute order approving the fil-
ing of a cost bond of \$250.00 one princi-
pal. Filing Stipulation re Amended
Complaint, Filing Motion for Leave to
Amend Complaint and Order Allowing

1950

Amendment. Filing Findings of Fact and Conclusions of Law.

June 23—Filing Judgment (in favor of certain intervenors and against defendant as follows: Raymond Au, \$74.90; Cornelio I. Agsalog, \$5.50; Edward Apana, \$74.88; Teofilo Barluado, \$2.40; Francisco David, \$6.00; Clarence J. Freitas, \$4.26; Joseph Freitas, \$11.56; Sadamu Fujikawa, \$.90; Sueki Fujikawa, \$9.90; Rosendo C. Gas-pang, \$2.76; Peter Akuna Goo, \$485.74; Robert Gouveia, \$30.62; Arthur K. Ho, \$86.28; Tokio Ige, \$10.50; Kim Sew Ing, \$15.00; Noboru Inouye, \$779.80; Hiroshi Kagawa, \$6.80; George H. Kahanu, \$72.26; Solomon Kailihiwa, \$11.90; Shigeo Kakumitsu, \$55.20; Daniel Kaleikini, \$9.76; Seichi Katsuyoshi, \$4.82; Yoshio Kawakami, \$7.60; Raymond Leopoldo, \$76.86; Martin Lopes, \$3.00; Masanobu Maeshiro, \$2.50; Katsumi Matsuda, \$6.80; Tsuguo Matsunobu, \$2.76; Bert Mitsun-age, \$231.66; Shiro Nakamura, \$5.00; Takeo Nishikawa, \$3.50; Manuel Ornalles, \$35.34; Joseph J. Perreira, \$12.02; Andres Ressoriction, \$4.00; E. S. Rose, \$234.18; Yoshitoyo Sakamoto, \$9.00; Juan Slazor, \$28.98; Yoshito Shigemura, \$21.20; Harold Y. Shito, \$436.08; Alfred P. Soares, \$15.40; John M. Soares, \$11.56; Frank Souza, \$15.46; Masaji Joseph Tani-

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guchi, \$138.12; Arthur M. Tavares, \$20.50; Shochi Tokita, \$5.00; Flemmino Tomayo, \$1.66; Kuniyoshi Yamada, \$70.74; Masao Yonemura, \$120.42; Kam Koon Wan et al. to recover nothing; deft. to pay costs of \$26.50 and atty's fee of \$1500; judgment by McLaughlin, Judge). Entered 6/23/50 at 2 p.m.

July 6—Filing Mandate—Court of Appeals 9th Circuit.

July 11—Filing Notice of Appeal. Copy mailed to Robertson, Castle & Anthony. Filing Bond for Costs on Appeal.

Aug. 16—Filing Order Extending Time to File Record on Appeal. Filing Designation of Contents of Record on Appeal.

[Endorsed]: No. 12677. United States Court of Appeals for the Ninth Circuit. Kam Koon Wan, on his own behalf and on behalf of all other persons and employees of defendant who are similarly situated, Appellant, vs. E. E. Black, Ltd., a Hawaiian corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Territory of Hawaii.

Filed September 8, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12,677

KAM KOON WAN, on His Own Behalf and on
Behalf of All Other Persons and Employees
of Defendant Who Are Similarly Situated,

Plaintiffs,

vs.

E. E. BLACK, LTD., a Hawaiian Corporation,
Defendant.

STATEMENT OF POINTS

Pursuant to Section 6, Rule 19, of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit, the appellants intend to rely upon the following statement of points:

I.

That the Court erred in granting in part the Motion of Defendant for Summary Judgment based on Section 9 of the Portal-to-Portal Act of 1947, in holding that the affidavits of the Defendant were sufficient "proof" within the meaning of Section 9 of said Act.

II.

That the Court erred in finding that though the Defendant was not in good faith misled into violating the Fair Labor Standards Act by the Orders of the Military Governor and that it knew or should

have known that obedience to the Orders of the Military Governor would result in such violation, nevertheless the Defendant did all that a reasonable man could have done under the circumstances and that, therefore, the violation of the Fair Labor Standards Act on threat of punishment if it complied therewith was a sufficient defense under Section 9 of the Portal-to-Portal Act.

III.

That the Court erred in finding that the Defendant was bound on threat of force to obey General Order No. 91 issued by the Military Governor in March, 1942, for the reason that the Order itself specifically exempted those employments covered by the Fair Labor Standards Act.

IV.

That the Court erred in ruling that the Order of the Military Governor was a "regulation, order, ruling, approval or interpretation" of an agency of the United States within the meaning of Section 9 of the Portal-to-Portal Act.

V.

That the Court erred in ruling that the claims of the appellants were statutory and not vested rights and hence could be divested by statutory action.

VI.

That the Court erred in denying the Motion for Rehearing of the Motion for Summary Judgment, on

all grounds of said Motion for Rehearing, filed March 11, 1948.

VII.

That with respect to work performed by the Defendant before December 7, 1941, as set forth in the Stipulation covering such work the Court erred in ruling:

a. That none of the work except the Federal Building in Hilo, Hawaii, performed by the Defendant under the caption "Federal Government" was within the scope of the Fair Labor Standards Act.

b. That as to the work under the caption "Territorial Government," the territorial wharf at Port Allen, Kauai, and the temporary quarters for the Hawaii National Guard at Schofield Barracks, Oahu, were not covered by the Fair Labor Standards Act.

c. That as to the work under the caption "Private Industry" the following were not covered by the Fair Labor Standards Act:

(1) The building of the new wharf for Inter-Island Steam Navigation Co.

(2) The erection of the new pier and shed (Pier 29) for Inter-Island Steam Navigation Co.

(3) The construction of a new substation at Hickam Field, Oahu, for Mutual Telephone Co.

(4) Digging and backfilling trenches for Hawaiian Electric Company, Ltd.

(5) Erection of a new warehouse storage building and roads, installation of underground storage tank, and construction of container plant and warehouse for Hawaiian Pineapple Company, Ltd.

(6) Extension of Pier 29 by constructing new wharf and shed for Inter-Island Steam Navigation Co.

(7) Digging and backfilling trenches for Honolulu Gas Co.

(8) Construction of a new building for Bishop National Bank at Hickam Field, Oahu.

To clarify the points and to assist in locating where the points were raised and ruled upon, Points I to V inclusive were ruled upon in Ruling Upon Motion for a Partial Summary Judgment, F.R.C.P. 56 (b) and (d), and covered generally in the "Partial Summary Judgment" and Point VII in the "Ruling Upon Coverage Pursuant to Stipulation."

VIII.

That the Court erred in arriving at its findings of fact and conclusions of law as based on the points hereinabove set forth.

IX.

That the Court erred in rendering its judgment as based on the points hereinabove set forth.

Dated: Honolulu, T. H., August 16, 1950.

Respectfully submitted,

/s/ SAMUEL LANDAU,

Attorney for Appellants.

Receipt of copy acknowledged.

[Endorsed]: Filed September 8, 1950.

No. 12677

United States
Court of Appeals
for the Ninth Circuit.

KAM KOON WAN, on His Own Behalf and on
Behalf of All Other Persons and Employees
of Defendant Who Are Similarly Situated,

Appellant,

vs.

E. E. BLACK, LTD., A Hawaiian Corporation,
Appellee.

SUPPLEMENTAL
Transcript of Record

Appeal from the United States District Court,
Territory of Hawaii.

FILED

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No. 12677

United States
Court of Appeals
for the Ninth Circuit.

KAM KOON WAN, on His Own Behalf and on
Behalf of All Other Persons and Employees
of Defendant Who Are Similarly Situated,

Appellant,

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E. E. BLACK, LTD., A Hawaiian Corporation,

Appellee.

SUPPLEMENTAL
Transcript of Record

Appeal from the United States District Court,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In The United States District Court
for the Territory of Hawaii

Civil No. 672

KAM KOON WAN, on His Own Behalf and on
Behalf of All Other Persons and Employees of
Defendant Who Are Similarly Situated,

Plaintiffs,

vs.

E. E. BLACK, LTD., a Hawaiian Corporation,
Defendant.

MOTION FOR LEAVE TO AMEND COMPLAINT

Comes now Kam Koon Wan, on his own behalf and on behalf of all other persons and employees of defendant who are similarly situated, by his attorney, Samuel Landau, and moves this Court for leave to amend Paragraphs III and VI of the complaint by including further allegations of jurisdiction so that the said complaint, as amended, will read as follows:

“AMENDED COMPLAINT

I.

Plaintiffs and each of them bring this action on behalf of themselves and on behalf of all other persons and employees similarly situated. Plaintiffs and said other persons and employees are hereinafter collectively and individually referred to as ‘plaintiffs.’

II.

Plaintiffs bring this action to recover from defendant unpaid overtime compensation and an additional equal amount of liquidated damages, pursuant to section 16 (b) of the Fair Labor Standards Act of 1938 (pub. No. 718, 76th Cong.; 52 Stat. 1060), hereinafter referred to as the Act.

III.

Jurisdiction is conferred on the court by section 41 (8), 28 U.S.C.A. (Judicial Code) 24, giving the District Court original jurisdiction 'of all suits and proceedings arising under any law regulating commerce,' and by section 16 (b) of the Act. Jurisdiction is also conferred on this court by Public Law 49, 80th Congress, Chapter 52, Paragraph 2, 61 Stat. 85; 29 U.S.C.A., Paragraph 252.

IV.

On the dates and during all of the times herein mentioned the defendant E. E. Black, Ltd., was and now is a corporation organized and doing business under the laws of the Territory of Hawaii, having its principal office and place of business at City and County of Honolulu, Territory of Hawaii.

V.

During all the times mentioned the defendant was engaged in a general construction business under contract with private individuals, City and County of Honolulu, the Territory of Hawaii, the United States or some department thereof.

During the six-year period next preceding the

filing of this action, plaintiffs were employed by the defendant and during every week of the said employment with the defendant, plaintiffs were employed and engaged by the defendant in work necessary to interstate commerce pursuant to the contract above mentioned.

VI.

In such business and during the six-year period next preceding the commencement of this action defendant employed plaintiffs in the following operations and capacities.

(1) Transportation of building materials assembling, stacking and delivering to job sites, installing and erecting materials.

(2) Repair, maintenance and new construction, including machinists, mechanics, welders, bricklayers, masons, carpenters of all kinds, blacksmith, steel workers, oilers, electricians, watchmen, painters, plumbers, road maintenance cantoneers, road construction workers, power shovel operators and scraper operators.

(3) General clerical employees, warehousemen, timekeepers, surveyors, engineers, research workers, draftsmen and other operations and capacities.

The said operations and capacities performed by plaintiffs were an essential part of the work necessary to complete the work to be performed in the contract herein above mentioned and are operations and functions necessary thereto.

All of said activities engaged in by the plaintiffs

were compensable by a provision of a contract in effect at the time of such activities between plaintiffs and defendant, in that defendant agreed to pay each of the plaintiffs a stipulated sum per hour for work performed for defendant, which was the regular rate of pay, and that in fact plaintiffs performed the work and the defendant did pay the regular rate. The activities in which plaintiffs were engaged were performed during that portion of the day with respect to which they were made compensable.

VII.

During the six-year period next preceding the commencement of this action defendant employed plaintiffs for work weeks in excess of forty-two hours prior to October 24, 1940, and for work weeks in excess of forty hours after October 24, 1940, without paying them the overtime compensation required by the Act for such employment during such work weeks. Specifically;

(a) The defendant failed and refused to pay overtime compensation required by the Act for hours worked during each work week in excess of forty-two prior to October 24, 1940, and in excess of forty hours worked during each work week subsequent to October 24, 1940, to those employees engaged in the operations described in sub-divisions 1, 2, and 3 of Paragraph VI above.

VIII.

The exact number of work weeks so worked by plaintiffs, the exact number of hours worked during

such weeks by plaintiffs, the types of work performed by plaintiffs were under-paid by defendant, are unknown to plaintiffs, but said exact number of work weeks, hours, wages and types of work performed by plaintiffs, and consequently the exact amounts by which plaintiffs were under-paid by defendant are known to defendant by virtue of the fact that defendant, during such period made, kept and preserved and now possess books, records and accounts of the wages and hours of plaintiffs' employment, as required by section 11 (c) of the Act.

Wherefore, plaintiffs pray that defendant be required to make known to plaintiffs the exact number of hours which plaintiffs and each of them are shown by defendant's records to have worked in each work week during the six-year period next preceding the commencement of this action, the hourly wage rate paid for such hours worked, the type of work performed by plaintiffs during such period and the overtime pay, if any, paid to plaintiffs during said period.

Plaintiffs further pray that judgment be awarded each of them for unpaid overtime compensation and for an additional equal amount as liquidated damages, together with costs and that the court allow a reasonable attorney's fee to be paid by the defendant."

This motion is made for the reason that Section 2 (d) of the Portal to Portal Act of 1947 (29 U.S.C.A., Paragraph 252) limits the jurisdiction of this court to actions under the Fair Labor Standards Act of 1938 for overtime compensation, which

seek to enforce liability with respect to an activity which is compensable under subsections (a) and (b) of Section 2 of said Act. 29 U.S.C.A., Paragraph 252.

Dated: Honolulu, T. H., this 23rd day of June, 1950.

/s/ SAMUEL LANDAU,
Attorney for Plaintiffs.

Consented To:

E. E. BLACK, LTD.
By ROBERTSON, CASTLE &
ANTHONY

By /s/ J. GARNER ANTHONY,
Its Attorneys.

ORDER

It is hereby ordered that the Motion for Leave to Amend Complaint is hereby granted and that the complaint, as amended, shall read as shown in said Motion.

Dated: Honolulu, T. H., this 23rd day of June, 1950,

/s/ J. FRANK McLAUGHLIN
District Judge.

[Endorsed]: Filed June 23, 1950.

[Endorsed]: No. 12677. United States Court of Appeals for the Ninth Circuit. Kam Koon Wan, on his own behalf and on behalf of all other persons and employees of defendant who are similarly situated, Appellant, vs. E. E. Black, Ltd., a Hawaiian Corporation, Appellee. Supplemental Transcript of Record. Appeal from the United States District Court for the Territory of Hawaii.

Filed September 8, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

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**In the United States Court of Appeals
for the Ninth Circuit**

**KAM KOON WAN, ON HIS OWN BEHALF AND ON BEHALF
OF ALL OTHER PERSONS AND EMPLOYEES OF DEFENDANT
WHO ARE SIMILARLY SITUATED, APPELLANTS**

v.

**E. E. BLACK, LTD., A HAWAIIAN CORPORATION,
APPELLEE**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE TERRITORY OF HAWAII**

**SUPPLEMENTAL MEMORANDUM FOR MAURICE J. TOBIN, SEC-
RETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
AS AMICUS CURIAE**

WILLIAM S. TYSON,
Solicitor,

BESSIE MARGOLIN,
Assistant Solicitor,

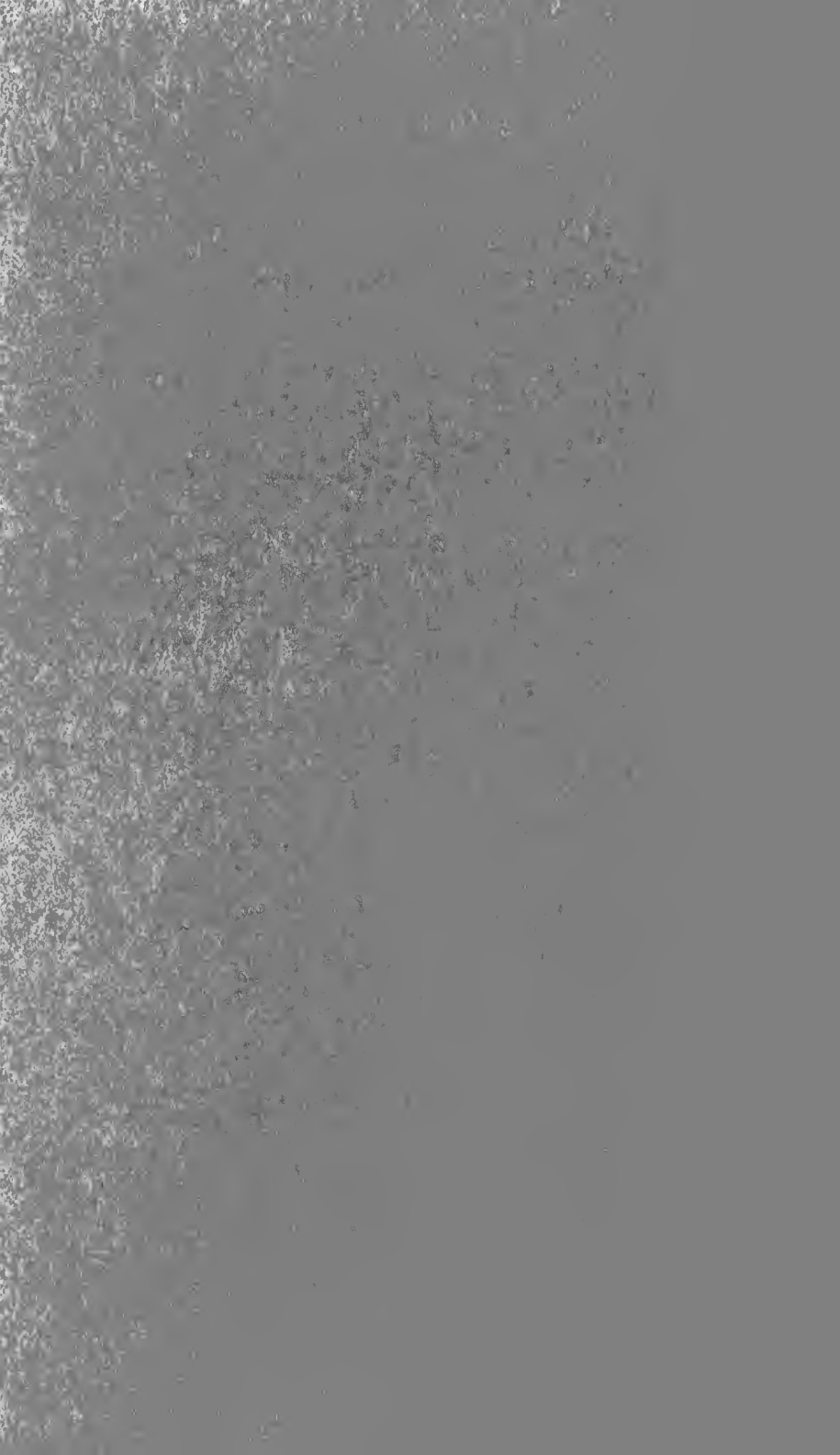
**WILLIAM A. LOWE,
HELEN GRUNDSTEIN,**
Attorneys,

*United States Department of Labor,
Washington, D. C.*

KENNETH C. ROBERTSON,
Regional Attorney.

FILED

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In the United States Court of Appeals for the Ninth Circuit

No. 12677

**KAM KOON WAN, ON HIS OWN BEHALF AND ON BEHALF
OF ALL OTHER PERSONS AND EMPLOYEES OF DEFENDANT
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**SUPPLEMENTAL MEMORANDUM FOR MAURICE J. TOBIN, SEC-
RETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
AS AMICUS CURIAE ¹**

Subsequent to the original submission of this case under No. 12229, the United States Supreme Court handed down a significant decision in *Powell v. United States Cartridge Co.*, and in the companion

¹ Subsequent to the filing of a brief *amicus curiae* in No. 12229, same title as this appeal, by the Administrator of the Wage and Hour Division, the Secretary of Labor, by virtue of 5 U. S. C., sec. 22 and Reorganization Plan No. 6 of 1950 (15 F. R. 3174), effective May 24, 1950, succeeded to the Administrator's rights and duties with respect to litigation under the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201, hereinafter referred to as "the Act."

cases of *Aaron v. Ford, Bacon & Davis, Inc.*, and *Creel v. Lone Star Defense Corporation*, 339 U. S. 497, which has a direct bearing on the issues in this case.

The Supreme Court's decision is of particular importance as it relates to the question whether compliance with military orders regulating wages and working conditions in Hawaii made compliance with the Fair Labor Standards Act impossible (Administrator's brief, pp. 12-18). This question arises with respect to wage claims allegedly owed for the period from December 7, 1941, to November 10, 1943. The court below in the instant case assumed that compliance with the Act was "impossible" (R. 48) and that appellee had "no freedom of choice" other than to violate the Fair Labor Standards Act (R. 45). On that assumption the trial court concluded that appellee's noncompliance with the Act was "in good faith in conformity with and in reliance on" orders of an agency of the United States (R. 147, 151), thus establishing a defense under Section 9 of the Portal-to-Portal Act.²

It is the Government's position that this ruling was erroneous because nothing in the military orders precluded concurrent compliance with the Act (Adm. Br. pp. 12-18). The principal holding of the Supreme Court in the *Powell* and companion cases, *supra*, was that private contractors working under public contracts stand in no different position with

² 61 Stat. 84, 29 U. S. C., Supp. III, 251, reprinted in the Administrator's brief in No. 12229, Appendix A, p. 20.

respect to compliance with the federal labor standards than other private contractors who are engaged in activities covered by the Act. One of the contentions of the contractors was that the Walsh-Healey Public Contracts Act and the Fair Labor Standards Act were mutually exclusive. This view, adopted by the Court of Appeals for the Eighth Circuit in the *Powell* and *Aaron* cases, 174 F. 2d 718 and 730, was explicitly rejected by the Supreme Court. The two Acts were held to be "mutually supplementary"

* * * "Despite evidence that the two statutes define overlapping areas, * * *." (339 U. S. 519-520.) The Walsh-Healey Act (like the military orders in this case) provides, inter alia, that overtime compensation be paid for hours worked in excess of 8 in any one day, and it was therefore urged that the Fair Labor Standards Act with its weekly overtime provisions was inconsistent and therefore not applicable to the contractors' employees. Substantially the same argument urged in the *Powell* and *Aaron* cases is urged here, i. e., since the military orders provide for daily overtime, the Fair Labor Standards Act provision for weekly overtime is inconsistent and cannot apply. The Supreme Court rejected this argument in the *Powell* and *Aaron* cases, stating:

There has been no presentation of instances, however, where compliance with one Act makes it impossible to comply with the other. There has been no demonstration of the impossibility of determining, in each instance, the respective wage requirements under each Act and then applying the higher requirement as satisfying both [339 U. S. at 519].

Like the Walsh-Healey Act, which was held compatible with concurrent operation of the Fair Labor Standards Act, the military orders—containing substantially the same wage standard as the Walsh-Healey Act—are equally compatible with concurrent operation of the Fair Labor Standards Act.

The Supreme Court's decision in the *Powell*, *Aaron*, and *Creel* cases also conclusively demonstrates the error of the district court's ruling in the instant case that work on some of the projects was excluded from coverage under the Fair Labor Standards Act because it was performed on military reservations (R. 79). In all three cases before the Supreme Court the work was performed on Federal military reservations, and this fact was urged by respondents before the Supreme Court to support a contention that coverage was defeated. (Supreme Court, October Term 1949, No. 58 *Creel v. Lone Star Defense Corp.*, Brief of Respondent pp. 7, 12; No. 79 *Aaron v. Ford, Bacon & Davis*, Brief of Respondent pp. 11, 21; No. 96 *Powell v. United States Cartridge Company*, Brief of Respondent pp. 11, 12, 30). The Court, however, did not consider the situs of the work as relevant to a determination of coverage.

The Supreme Court's decision also supports the Administrator's position that the Act should not be construed to exclude broad categories of employees without inquiring into the details of their duties (Adm. Br. pp. 4-8). Referring to the "breadth of coverage" of the Act and the "narrow and specific" exemptions, the Court stated "Such specificity in

stating exemptions strengthens the implication that employees not thus exempted, such as employees of private contractors under public contracts, remain within the Act'' (339 U. S. at 517). Thus to ignore the possible interstate activities of individual claimants by summary conclusion that *no* work relating to the numerous projects here involved could come within the coverage of the Act is, in effect, to provide by implication sweeping exemptions for many kinds of work. The decision below disposes summarily of complex factual issues based only on brief descriptions of the projects to which the employees' work related. The Secretary, therefore, respectfully suggests that this Court remand the case for detailed consideration by the trial court with respect to the interstate aspects of the individual claimants' work. Cf. *Waialua Agricultural Co. v. Maneja*, 178 F. 2d 603 (C. A. 9), certiorari denied 339 U. S. 920.

Respectfully submitted.

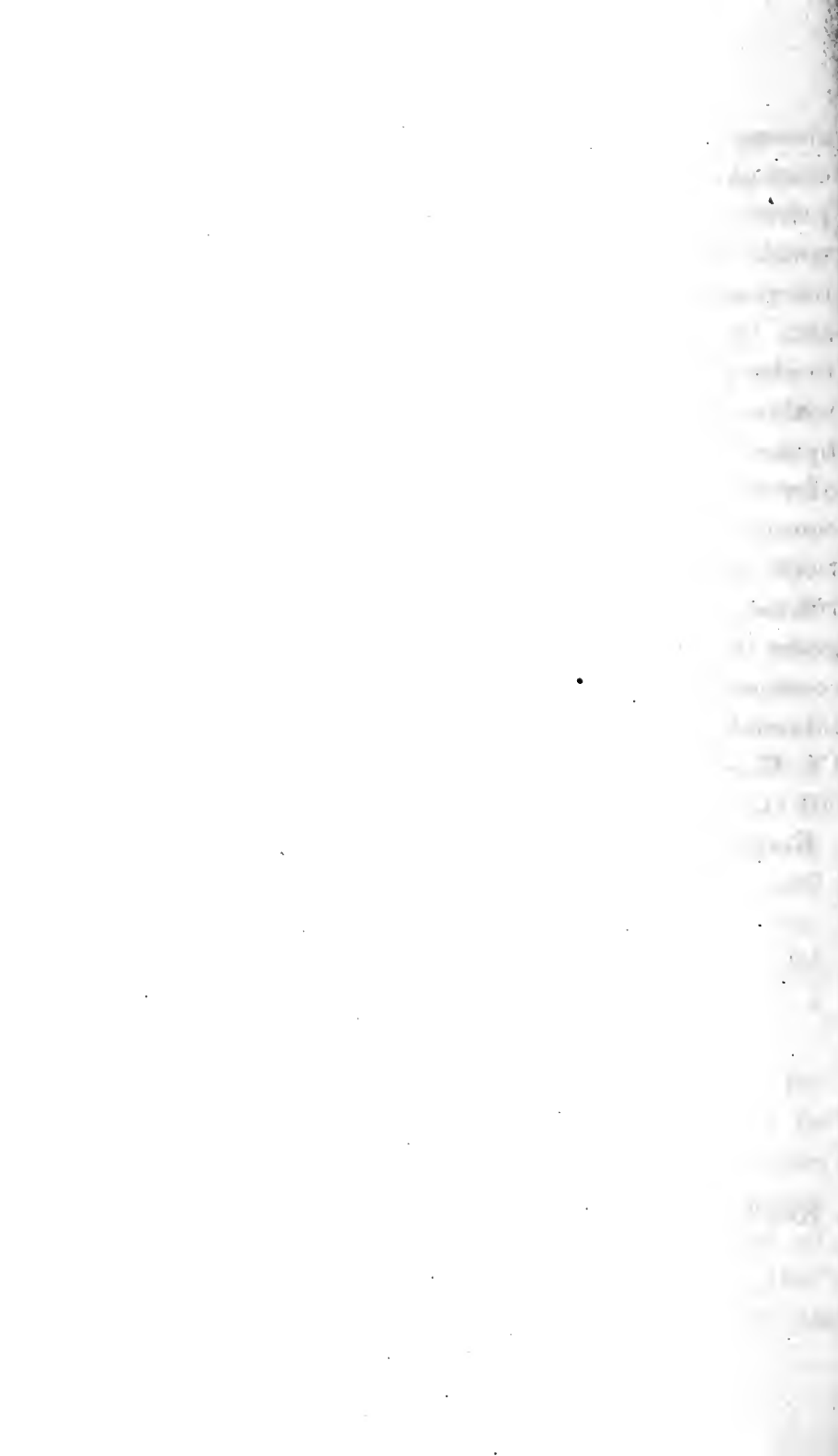
WILLIAM S. TYSON,
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BESSIE MARGOLIN,
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HELEN GRUNDSTEIN,
Attorneys,

United States Department of Labor,
Washington, D. C.

KENNETH C. ROBERTSON,
Regional Attorney.



No. 12678

United States
Court of Appeals
for the Ninth Circuit.

FEDERAL SERVICES FINANCE CORPORATION, a Corporation,

Appellant,

vs.

BISHOP NATIONAL BANK OF HAWAII AT
HONOLULU, a Corporation,

Appellee.

Transcript of Record

NOV 24 1950

PAUL P. O'BRIEN,
CLERK

Appeal from the United States District Court,
for the Territory of Hawaii.

No. 12678

**United States
Court of Appeals**
for the Ninth Circuit.

FEDERAL SERVICES FINANCE CORPORATION, a Corporation,

Appellant,

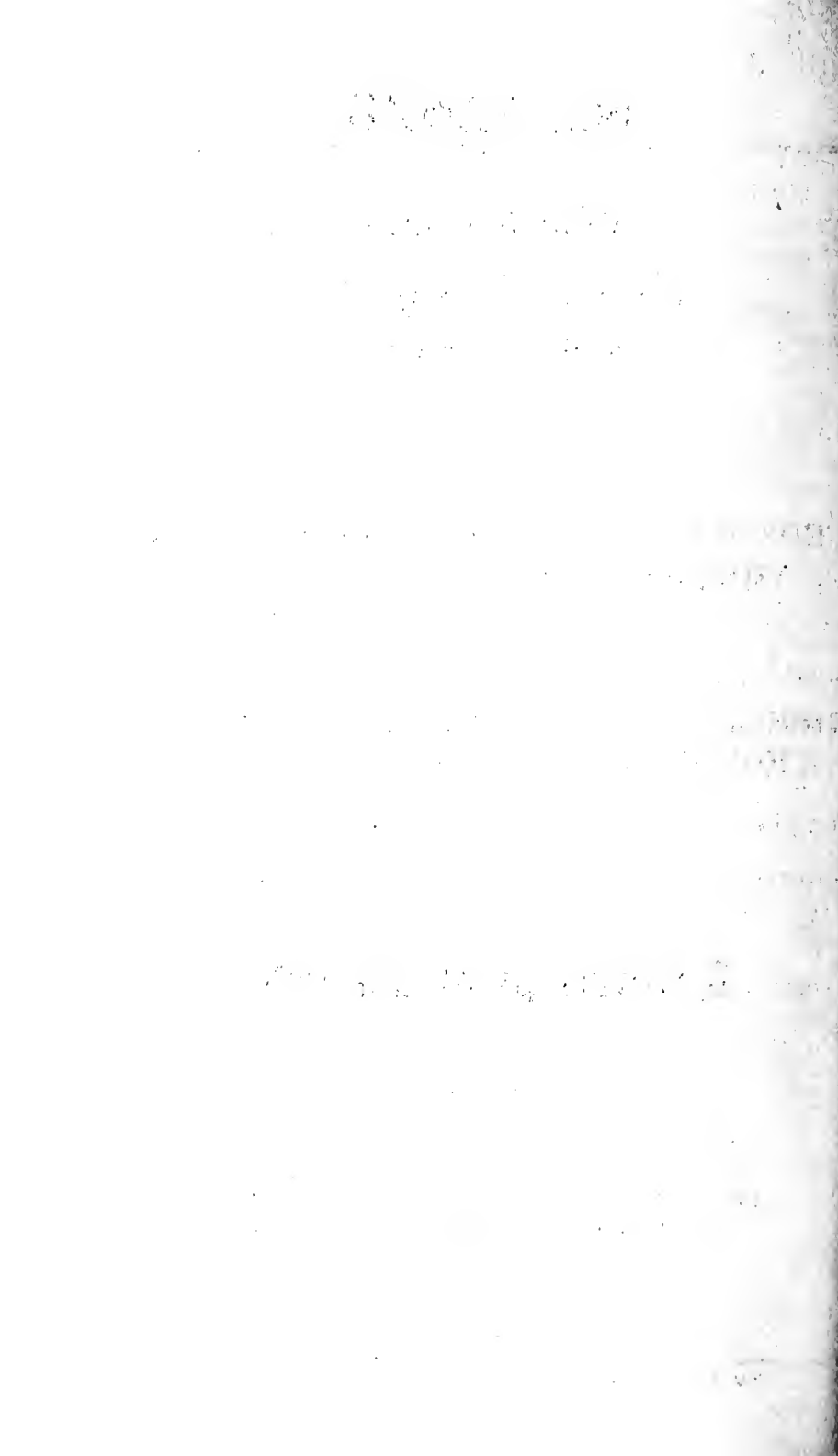
vs.

**BISHOP NATIONAL BANK OF HAWAII AT
HONOLULU, a Corporation,**

Appellee.

Transcript of Record

**Appeal from the United States District Court,
for the Territory of Hawaii.**



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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

For the Plaintiff, Federal Services Finance Corporation;

LEWIS, KIMBALL & BUCK,
1160 Bishop Street,
Honolulu, T. H.

For the Defendant, Bishop National Bank of Hawaii
at Honolulu,

SMITH, WILD, BEEBE & CADES,
Bishop Trust Building,
Honolulu, T. H.

ANDERSON, WRENN & JENKS,
Bank of Hawaii Building,
Honolulu, T. H.

In the United States District Court for the
Territory of Hawaii
Civil No. 947

FEDERAL SERVICES FINANCE
CORPORATION, a Delaware Corporation,
Plaintiff,

vs.

BISHOP NATIONAL BANK OF HAWAII AT
HONOLULU, a Hawaiian Corporation,
Defendant.

COMPLAINT

Plaintiff, Federal Services Finance Corporation,
a corporation, complaining of Bishop National Bank
of Hawaii at Honolulu, a corporation, alleges:

1.

Plaintiff is a corporation incorporated under the
laws of the State of Delaware. Defendant is a cor-
poration incorporated under the laws of the Terri-
tory of Hawaii. The matter in controversy exceeds,
exclusive of interest and costs, the sum of \$3,000.00.

2.

At all times herein mentioned defendant has been
and is now carrying on a general banking business
in the Territory of Hawaii, and maintains and con-
ducts a bank in the City and County of Honolulu,
said Territory. Plaintiff at all times herein men-

tioned has had money on deposit in a commercial checking account in defendant's said bank at Honolulu.

3.

On or about the dates hereinafter named, plaintiff drew its certain checks against said account in defendant's said bank for the respective amounts set opposite said respective dates, to wit:

1. Check No. VH 9007 dated January 21, 1949, in the amount of \$1,337.00.
2. Check No. VH 9316 dated February 10, 1949, in the amount of \$1,500.00.
3. Check No. VH 9919 dated March 22, 1949, in the amount of \$1,500.00.
4. Check No. VH 10017 dated March 29, 1949, in the amount of \$1,500.00.
5. Check No. VH 10065 dated March 31, 1949, in the amount of \$1,437.00.
6. Check No. VH 10157 dated April 6, 1949, in the amount of \$1,500.00.
7. Check No. VH 10248 dated April 13, 1949, in the amount of \$1,000.00.
8. Check No. VH 10576 dated May 6, 1949, in the amount of \$1,240.00.
9. Check No. VH 10733 dated May 17, 1949, in the amount of \$1,200.00.
10. Check No. VH 10770 dated May 19, 1949, in the amount of \$2,480.00.

11. Check No. VH 10774 dated May 19, 1949, in the amount of \$1,495.00.

4.

Each and every of said checks was payable to the order of Waipahu Auto Exchange, Limited, a corporation organized under the laws of the Territory of Hawaii, as payee herein.

5.

On or about the respective dates of said checks one Anthony Yee took said checks and wrongfully, and without any right, authority or permission, endorsed each thereof in blank with the name of the payee named therein.

6.

None of said checks was paid by said defendant according to the terms of said checks, to wit: to said payee named therein or to the order of said payee.

7.

On or about the respective dates of said checks, upon presentation thereof for payment, defendant wrongfully cancelled each said check and wrongfully deducted and withdrew from plaintiff's said account in defendant's said bank, a sum equal to the full amount of each said check and charged its account with each such amount.

8.

Heretofore and prior to the commencement of this action, plaintiff tendered each and every said can-

celled check to defendant and demanded of defendant that defendant repay to plaintiff the sum of \$16,189.00, being the aggregate amount of said checks, and of said deductions and withdrawals by defendant from plaintiff's said account in defendant's said bank, but defendant refused and still refuses to pay the same, and that no part of said sum has been paid to plaintiff, or at all.

9.

By reason of the foregoing there is now due, owing and unpaid from defendant to plaintiff the sum of \$16,189.00.

Wherefore, plaintiff demands judgment against defendant for the sum of \$16,189.00, together with interest, costs, expenses and attorney's fees.

Dated at Honolulu, Hawaii, October 3rd, 1949.

LEWIS, KIMBALL & BUCK,

/s/ EDWARD Z. BUCK,

Attorney for Plaintiff.

[Endorsed]: Filed October 3, 1949.

[Title of District Court and Cause.]

ANSWER OF BISHOP NATIONAL BANK
OF HAWAII AT HONOLULU

For answer to the complaint of the plaintiff in the above-entitled cause, defendant, Bishop National Bank of Hawaii at Honolulu, a national banking

association (erroneously referred to in the complaint as a Hawaiian corporation) says:

First Defense

The complaint fails to state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant.

Second Defense

1. Defendant admits the allegations of paragraphs 1, 2, 3 and 4, except that defendant denies that it is a corporation incorporated under the laws of the Territory of Hawaii.

2. Defendant denies the allegations of paragraph 5, and avers that at all relevant times Anthony Yee was president of Waipahu Auto Exchange, Limited, a Hawaiian corporation, and the payee named in each of the checks herein referred to; that the checks referred to in said paragraph were delivered by the plaintiff to Anthony Yee, in his capacity as president of Waipahu Auto Exchange, Limited; that the acceptance of delivery by Anthony Yee was in accordance with right, authority and permission of the corporation; that said Anthony Yee, in his capacity as president of said corporation, did have actual, implied and apparent authority to receive said checks and to negotiate and endorse the same and said Anthony Yee, as president as aforesaid, did in fact negotiate and endorse said checks and each of them; that the defendant had no knowledge of any limitation upon the authority of said Anthony Yee.

3. Defendant denies the allegations of paragraph 6.

4. Answering paragraph 7, defendant denies the allegations thereof, but admits that upon presentation of the following checks for payment by Anthony Yee, in his capacity as president of Waipahu Auto Exchange, Limited, as aforesaid, the defendant did cash said checks, did cancel the same, and did charge the amounts thereof against the account of the plaintiff, viz:

(1) Check No. VH 9007, dated January 21, 1949, in the amount of \$1,337.00;

(2) Check No. VH 9316, dated February 10, 1949, in the amount of \$1,500.00;

(3) Check No. VH 9919, dated March 22, 1949, in the amount of \$1,500.00;

(4) Check No. VH 10017, dated March 29, 1949, in the amount of \$1,500.00;

(5) Check No. VH 10065, dated March 31, 1949, in the amount of \$1,437.00;

(6) Check No. VH 10157, dated April 6, 1949, in the amount of \$1,500.00;

(7) Check No. VH 10248, dated April 13, 1949, in the amount of \$1,000.00;

(8) Check No. VH 10576, dated May 6, 1949, in the amount of \$1,240.00;

—that prior to cashing each of said checks said Anthony Yee was identified by an authorized em-

ployee of the defendant as being the president of the said Waipahu Auto Exchange, Limited, and at the time of the cashing of each of said checks the defendant in good faith, believed that said Anthony Yee, as president as aforesaid, had authority to cash said checks, and relied upon representations made by said Anthony Yee that he was cashing said checks for a corporate purpose, and had no knowledge of any limitation upon the authority of said Anthony Yee to receive payment therefor.

5. Further answering said paragraph 7, defendant avers on information and belief that with respect to the following checks, viz:

(9) Check No. VH 10733, dated May 17, 1949, in the amount of \$1,200.00;

(10) Check No. VH 10770, dated May 19, 1949, in the amount of \$2,480.00; and

(11) Check No. VH 10774, dated May 19, 1949, in the amount of \$1,495.00,

—said Anthony Yee, in his capacity as president of Waipahu Auto Exchange, Limited, as aforesaid, presented each of said checks to the Bank of Hawaii, a Hawaiian banking corporation; that an authorized employee of said Bank of Hawaii identified Anthony Yee as president of said corporation; that said Bank of Hawaii made payment of each of said checks to Anthony Yee in his capacity as president aforesaid; that said Bank of Hawaii endorsed each of said checks to the order of any bank, banker or trust company and guaranteed all prior endorse

ments and thereafter delivered said checks so endorsed to the defendant; that at the time that the Bank of Hawaii cashed each of said checks defendant avers on information and belief that the Bank of Hawaii acted in good faith, believing that said Anthony Yee, as president as aforesaid, had authority to cash said checks, and had no knowledge of any limitation upon the authority of the said Anthony Yee to receive payment therefor, and relied upon representations made by said Anthony Yee that he was cashing said checks for a corporate purpose.

6. Defendant admits the allegations of paragraph 8 and further avers that prior to the commencement of this action plaintiff tendered, in addition to the checks referred to in the complaint, Check No. VH 9435, dated February 17, 1949, in the amount of \$1,537.00, and demanded, in addition to the amounts referred to in said paragraph 8, the repayment of said check.

7. Defendant denies the allegations of paragraph 9 and alleges that there is no sum owing from the defendant to the plaintiff by reason of the matters hereinabove alleged.

Third Defense

1. And for a further and separate defense the defendant avers that the plaintiff has had a commercial checking account with the defendant since June 16, 1937; that each and every month checks drawn by the plaintiff on said bank account were returned to the plaintiff with a monthly statement of

account; that by the monthly statements the plaintiff was put on notice that unless within thirty (30) days from the date of the receipt of the statement the defendant was notified of errors in the statement the depositor would be deemed to have accepted the statement as correct; that by reason of the existence of said account and of said practice in connection therewith the plaintiff was under a duty to examine its returned cancelled checks and to do everything reasonably calculated to disclose unauthorized signatures, if any, and to give prompt notice of any unauthorized signatures to the bank; that if, as alleged by the plaintiff, the acts of Anthony Yee were in fact unauthorized, because of its close business association with Waipahu Auto Exchange, Limited, plaintiff was in the best position to ascertain such fact and was bound to notify the defendant within thirty (30) days from the receipt of the cancelled checks that the endorsements were unauthorized; that Waipahu Auto Exchange, Limited, was not a client, customer or depositor of the defendant; that defendant avers on information and belief that plaintiff in issuing its checks relied upon the authority of Anthony Yee to act for Waipahu Auto Exchange, Limited, and relied on the fact that said Anthony Yee could by his own signature transfer the title to motor vehicles under the Motor Vehicle Registration Law, and that he could and did transfer and assign conditional sales contracts to the plaintiff, said conditional sales contracts having been entered into for and on behalf of said Waipahu Auto Exchange, Limited, solely by said Anthony

Yee as president as aforesaid; that plaintiff has wholly neglected and failed to discharge the said duty to said bank and by reason of a breach thereof is estopped to claim that the endorsement by said Anthony Yee in his capacity as president as aforesaid was unauthorized.

2. Upon information and belief defendant avers that the proceeds of the following checks, viz: Check No. VH 10770, dated May 19, 1949, in the amount of \$2,480.00, and Check No. VH 10774, dated May 19, 1949, in the amount of \$1,495.00; were used in part by said Anthony Yee to purchase a cashier's check to be placed to the credit of Waipahu Auto Exchange, Limited, in the amount of \$3,582.78; that said cashier's check was in fact deposited to the credit of Waipahu Auto Exchange, Limited, in the Waipahu Branch of the Bank of Hawaii.

3. Defendant avers that on or about February 17, 1949, defendant cashed in the same manner alleged in paragraph 4 of the Second Defense (incorporated herein by reference) hereinabove a check numbered VH 9435, dated February 17, 1949, in the amount of \$1,537.00, drawn by the plaintiff and payable to Waipahu Auto Exchange, Limited; that defendant is informed and believes that Waipahu Auto Exchange, Limited, received the proceeds of said check directly or indirectly.

4. Defendant is informed and believes that in one or more other instances, the details of which are unknown to this defendant, checks payable to

Waipahu Auto Exchange, Limited, drawn by other drawers, were with the consent and acquiescence of other officers and directors of the corporation endorsed and cashed by the said Anthony Yee in his capacity as president as aforesaid.

5. The defendant is informed and believes that other officers and directors of Waipahu Auto Exchange, Limited from time to time represented that said Anthony Yee, in his capacity as president as aforesaid, had full authority to carry on financial transactions on behalf of Waipahu Auto Exchange, Limited, and to execute on behalf of the corporation any and all documents involved in any such transaction, and the defendant and others have relied upon said representations; that by reason of the foregoing course of conduct Waipahu Auto Exchange, Limited, and the plaintiff are estopped to deny that Anthony Yee, in his capacity as president, had authority to negotiate and endorse the said checks as aforesaid.

Fourth Defense

Defendant avers on information and belief that some time prior to June 8, 1949, the plaintiff learned for the first time that Mr. Anthony Yee had committed a number of defalcations and thereafter attempted to commit suicide; that after making an investigation, plaintiff then discovered that some of the vehicles described in the conditional sales agreements which it had discounted for Waipahu Auto Exchange, Limited, were in fact fictitious; defend-

ant avers that the plaintiff was at fault in fully relying upon Anthony Yee and in putting into circulation negotiable instruments which enabled him, as president as aforesaid, to impose loss upon innocent persons and that the plaintiff is not entitled to recover from the defendant any amount to make good the loss which resulted from its own negligence and misplaced confidence in said Anthony Yee.

Wherefore defendant prays that the complaint of the plaintiff be dismissed with costs to the defendant.

Dated: Honolulu, T. H., this 24th day of October, 1949.

/s/ J. RUSSELL CADES,

/s/ H. BAIRD KIDWELL,

Attorneys for Defendant.

SMITH, WILD, BEEBE &
CADES,

ANDERSON, WRENN &
JENKS,

Of Counsel.

Receipt of Copy Acknowledged.

[Endorsed]: Filed October 24, 1949.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Plaintiff, Federal Services Finance Corporation,
a corporation, complaining of Bishop National

Bank of Hawaii at Honolulu, a corporation, alleges:

1.

Plaintiff is a corporation incorporated under the laws of the State of Delaware. Defendant is a national banking association located in the Territory of Hawaii. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

2.

At all times herein mentioned defendant has been and is now carrying on a general banking business in the Territory of Hawaii, and maintains and conducts a bank in the City and County of Honolulu, said Territory. Plaintiff at the times herein mentioned had money on deposit in a commercial checking account in defendant's said bank at Honolulu in excess of the amounts of the checks herein after mentioned and all other checks drawn by plaintiff on defendant bank when presented for payment.

3.

On or about the dates hereinafter named, plaintiff drew its certain checks against said account in defendant's said bank for the respective amounts set opposite said respective dates, to wit:

1. Check No. VH 9007 dated January 21, 1949, in the amount of \$1,337.00.

2. Check No. VH 9316 dated February 10, 1949, in the amount of \$1,500.00

3. Check No. VH 9435, dated February 17, 1949, in the amount of \$1,537.00
4. Check No. VH 9919 dated March 22, 1949, in the amount of \$1,500.00
5. Check No. VH 10017 dated March 29, 1949, in the amount of \$1,500.00.
6. Check No. VH 10065 dated March 31, 1949, in the amount of \$1,437.00
7. Check No. VH 10157 dated April 6, 1949, in the amount of \$1,500.00
8. Check No. VH 10248 dated April 13, 1949, in the amount of \$1,000.00
9. Check No. VH 10576 dated May 6, 1949, in the amount of \$1,240.00
10. Check No. VH 10733 dated May 17, 1949, in the amount of \$1,200.00
11. Check No. VH 10770 dated May 19, 1949, in the amount of \$2,480.00
12. Check No. VH 10774 dated May 19, 1949, in the amount of \$1,495.00

4.

Each and every of said checks was payable to the order of Waipahu Auto Exchange, Limited, a corporation organized under the laws of the Territory of Hawaii, as payee therein.

5.

On or about the respective dates of said checks one Anthony Yee took said checks and wrongfully, and without any right, authority or permission, endorsed each thereof in blank with the name of the payee named therein.

6.

None of said checks was paid by said defendant according to the terms of said checks, to wit: to said payee named therein or to the order of said payee.

7.

On or about the respective dates of said checks, upon presentation thereof for payment, defendant wrongfully cancelled each said check and wrongfully deducted and withdrew from plaintiff's said account in defendant's said bank, a sum equal to the full amount of each said check and charged its account with each such amount.

8.

Heretofore and prior to the commencement of this action, plaintiff tendered each and every said cancelled check to defendant and demanded of defendant that defendant repay to plaintiff the sum of \$17,726.00, being the aggregate amount of said checks, and of said deductions and withdrawals by defendant from plaintiff's said account in defendant's said bank, but defendant refused and still refuses to pay the same, and that no part of said sum has been paid to plaintiff, or at all.

9.

By reason of the foregoing there is now due, owing and unpaid from defendant to plaintiff the sum of \$17,726.00 in addition to sums admitted by defendant to be owing to plaintiff by reason of said commercial checking account maintained by plaintiff in defendant's said bank.

Wherefore, plaintiff demands judgment against defendant for the sum of \$17,726.00, together with interest, costs, expenses and attorney's fees.

Dated at Honolulu, Hawaii, March 15th, 1950.

/s/ EDWARD Z. BUCK,
Attorney for Plaintiff.

Receipt of Copy Acknowledged.

[Endorsed]: Filed March 15, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The case having come on for hearing before the undersigned Judge, the parties hereto having waived jury trial and the plaintiff having presented its evidence and rested, and the court having found that upon the evidence adduced the complaint should be dismissed and judgment entered in favor of the defendant, upon the record, testimony and evidence adduced in this case the court makes the following findings of fact:

1.

Plaintiff is a corporation incorporated under the laws of the State of Delaware. Defendant is a national banking association located in the Territory of Hawaii. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

2.

That the defendant has at all relative times and is now carrying on a general banking business in the Territory of Hawaii and maintains and conducts a bank in the City and County of Honolulu, said Territory. Plaintiff at all relative times had money on deposit in a commercial checking account in defendant's said bank in Honolulu in excess of the amounts of the checks which are the subject of this litigation and all other checks drawn by the plaintiff on the defendant bank when presented for payment.

3.

On or about the dates hereinafter named, plaintiff drew and delivered its certain checks against said account in defendant's said bank for the respective amounts set opposite said respective dates, to wit:

1. Check No. VH 9007 dated January 21, 1949, in the amount of \$1,337.00

2. Check No. VH 9316 dated February 10, 1949, in the amount of \$1,500.00

3. Check No. VH 9435 dated February 17, 1949, in the amount of \$1,537.00

4. Check No. VH 9919 dated March 22, 1949, in the amount of \$1,500.00

5. Check No. VH 10017 dated March 29, 1949, in the amount of \$1,500.00

6. Check No. VH 10065 dated March 31, 1949, in the amount of \$1,437.00

7. Check No. VH 10157 dated April 6, 1949, in the amount of \$1,500.00

8. Check No. VH 10248 dated April 13, 1949, in the amount of \$1,000.00

9. Check No. VH 10576 dated May 6, 1949, in the amount of \$1,240.00

10. Check No. VH 10733 dated May 17, 1949, in the amount of \$1,200.00

11. Check No. VH 10770 dated May 19, 1949, in the amount of \$2,480.00

12. Check No. VH 10774 dated May 19, 1949, in the amount of \$1,495.00.

4.

Each and every of said checks was payable to the order of Waipahu Auto Exchange, Limited, a corporation organized under the laws of the Territory of Hawaii, as payee therein, and were delivered to Anthony Yee in his capacity as President of said corporation.

5.

That in addition to the checks which are the subject of this litigation plaintiff drew its check No.

VH 10605 dated May 9, 1949, in the amount of \$1455.00, which said check was likewise payable to Waipahu Auto Exchange, Limited, and was delivered to said Anthony Yee, in his capacity as President of said corporation.

6.

That all of the checks referred to in paragraph 3 and the check referred to in paragraph 5 were each endorsed on behalf of Waipahu Auto Exchange, Limited, by Anthony Yee as President; that said Anthony Yee, at the time that he endorsed each of said checks, was the President of said corporation and as such president endorsed and cashed said checks.

7.

That upon presentation of the following checks for payment by Anthony Yee in his capacity as President of Waipahu Auto Exchange, Limited, the defendant did cash said checks, did cancel the same and did charge the amounts thereof against the account of the plaintiff, viz:

1. Check No. VH 9007 dated January 21, 1949, in the amount of \$1,337.00

2. Check No. VH 9316 dated February 10, 1949, in the amount of \$1,500.00

3. Check No. VH 9435 dated February 17, 1949, in the amount of \$1,537.00

4. Check No. VH 9919 dated March 22, 1949, in the amount of \$1,500.00

5. Check No. VH 10017 dated March 29, 1949, in the amount of \$1,500.00

6. Check No. VH 10065 dated March 31, 1949, in the amount of \$1,437.00

7. Check No. VH 10157 dated April 6, 1949, in the amount of \$1,500.00

8. Check No. VH 10248 dated April 13, 1949, in the amount of \$1,000.00

9. Check No. VH 10576 dated May 6, 1949, in the amount of \$1,240.00

8.

That with respect to the following checks, viz:

Check No. VH 10733 dated May 17, 1949, in the amount of \$1,200.00

Check No. VH 10770 dated May 19, 1949, in the amount of \$2,480.00

Check No. VH 10774 dated May 19, 1949, in the amount of \$1,495.00

said Anthony Yee, in his capacity as President of Waipahu Auto Exchange, Limited, presented and cashed each of said checks at the Bank of Hawaii, a Hawaiian banking corporation; that said Bank of Hawaii endorsed each of said checks to the order of any bank, banker or trust company and guaranteed all prior endorsements and thereafter delivered said checks so endorsed to the defendant; that said defendant did cancel the same and did charge the amounts thereof against the account of the plaintiff.

9.

That with respect to the following check, viz:

Check No. VH 10605 dated May 9, 1949, in the amount of \$1455.00

said Anthony Yee in his capacity as President of Waipahu Auto Exchange, Limited, as aforesaid, presented said check to the plaintiff, said plaintiff made payment of said check to Anthony Yee upon his endorsement as President as aforesaid, and said Plaintiff thereafter endorsed said check, cashed as aforesaid, and deposited it in plaintiff's commercial checking account with the defendant; defendant did cancel the same and did charge the amount thereof against the account of the plaintiff.

10.

That Waipahu Auto Exchange, Limited, maintained a checking account in the Bank of Hawaii and did not maintain an account in the defendant bank; that one Takeshi Yokono was the Treasurer of Waipahu Auto Exchange, Limited; that as Treasurer he knew that the corporation had dealings with the plaintiff but the corporation never adopted any resolution relating to the conduct of that business; that the Treasurer had no personal knowledge of any arrangements that had been made on behalf of the Waipahu Auto Exchange, Limited, with the plaintiff corporation and he depended on the President of the corporation, Anthony Yee, to make and carry out the business arrangement with the plaintiff corporation.

11.

Herbert Lee, an attorney at law, was the attorney for Waipahu Auto Exchange, Limited, and for the associates prior to incorporation. Mr. Lee drafted the proposed by-laws and articles of association, and, although not a stockholder, made himself one of the incorporators to comply with the Hawaii statute requiring five incorporators. Mr. Lee also described himself as a "dummy director." He was never notified of any meetings of directors, and never attended any directors' or stockholders' meetings. No substitute director was ever appointed for Mr. Lee. The business of the corporation was carried on in an informal manner.

12.

The deposit by the plaintiff of a check cashed for the corporation by Anthony Yee constituted a representation to the Bank that Anthony Yee was authorized to cash checks.

13.

The plaintiff received from the defendant bank each month a statement of its account with the cancelled checks and on each of said monthly statement there appeared the statement, "If you do not notify us within 30 days from this date you will be deemed to have accepted the statement as correct and the vouchers and checks as genuine." The plaintiff did not customarily examine the endorsements on its checks and did not notify the Bank that it objected to any charges against the account until

some time after May 19, 1949. On May 2, 1949, the corporation was without funds and Yee and Yokono agreed that they must help the company by financing. To assist the corporation Yee gave the corporation his personal check in the amount of \$3582.78 which check was turned down by the defendant bank for insufficient funds after it had been deposited by Waipahu Auto Exchange, Limited, in its bank account in the Bank of Hawaii. Later Yee made the check good but there is no evidence as to how the check was made good. The Treasurer was relying upon the President for the financial operations of Waipahu Auto Exchange, Limited.

Conclusions of Law

1. That by virtue of this office as President of Waipahu Auto Exchange, Limited, Anthony Yee had prima facie authority to endorse negotiable paper and receive payment therefor on behalf of said corporation.

2. That by virtue of the acts of officers and directors of the corporation, in permitting the President to make financial arrangements for the corporation, the President, Anthony Yee, had implied authority to endorse the checks in question and receive payment therefor on behalf of said corporation.

3. That the President, Anthony Yee, had apparent authority to endorse the checks in question and receive payment therefor on behalf of said corporation.

4. That Anthony Yee dealt for the corporation in the affairs of its financing with the knowledge of its officers and directors, and no notification was given to the defendant that the President's authority to endorse checks was in any manner limited.

5. That the plaintiff has wholly failed to prove the allegation No. 5 of its Complaint, viz:

"On or about the respective dates of said checks one Anthony Yee took said checks and wrongfully, and without any right, authority or permission, endorsed each thereof in blank with the name of the payee named therein."

6. That each of said checks has been paid in accordance with the terms thereof.

7. Judgment dismissing the Complaint and in favor of the defendant will be entered upon presentation.

Dated: Honolulu, T. H., this 10th day of April, 1950.

/s/ A. E. METZGER,

Judge, United States District
Court.

Receipt of Copy Acknowledged.

[Endorsed]: Filed April 10, 1950.

In the United States District Court
For the District of Hawaii
Civil No. 947

FEDERAL SERVICES FINANCE
CORPORATION, a Delaware Corporation,
Plaintiff.

vs.

BISHOP NATIONAL BANK OF HAWAII
AT HONOLULU, a National Banking
Association,
Defendant.

JUDGMENT

This cause having come on regularly for trial on March 15, 1950 before the Court sitting without a jury; and at the conclusion of the testimony adduced and presented by and on behalf of the plaintiff counsel for the defendant having made a motion for judgment of dismissal upon the merits and the Court having heard arguments of counsel in support of and against said motion, and having filed its Findings of Fact and Conclusions of Law herein; Now, Therefore,

It Is Hereby Ordered, Adjudged and Decreed that said action is hereby dismissed upon the merits, and that the plaintiff take nothing by this action and that the defendant go hereof without day.

Dated this 10th day of April, 1950.

/s/ D. E. METZGER,

Judge, United States District
Court.

Docketed April 10, 1950.

[Endorsed]: Filed April 10, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Federal Services Finance Corporation, a Delaware Corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on April 10, 1950. This appeal is taken pursuant to Rule 73 (a) of Rules of Civil Procedure for District Courts within thirty (30) days following the denial of a motion for a new trial under Rule 59 of said rules, which motion was denied on May 19, 1950.

Dated: Honolulu, T. H., this 15th day of June, 1950.

/s/ WILLIAM W. SAUNDERS,
Attorney for Appellant, Federal Services Finance Corporation.

[Endorsed]: Filed June 16, 1950.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men By These Presents:

That we, Federal Services Finance Corporation, a Delaware corporation, as principal, and Home Insurance Company of Hawaii, Limited, as surety, are held and firmly bound unto the above named defendant, Bishop National Bank of Hawaii at Honolulu, a national banking association, in the full and just sum of Two Hundred Fifty Dollars (\$250.00), to be paid to the said defendant, its successors or assigns, to which payment well and truly to be

made we bind ourselves, our successors and assigns, jointly and severally by these presents.

Executed this 16th day of June, 1950.

The condition of this obligation is such that:

Whereas, on the 10th day of April, 1950, in the above entitled action between the above named plaintiff, Federal Services Finance Corporation, and the above named defendant, Bishop National Bank of Hawaii at Honolulu, a judgment was rendered against the said plaintiff and the said plaintiff has appealed to the United States Court of Appeals for the Ninth Circuit;

Now, Therefore, if said Federal Services Finance Corporation shall pay the costs if said appeal is dismissed or the judgment affirmed, or such costs as the appellate court may award if the judgment is modified, then the above obligation to be void; otherwise in full force and effect.

FEDERAL SERVICES
FINANCE CORPORATION,

By /s/ L. S. HOLLOWAY,
Its Manager, Honolulu
Branch.

HOME INSURANCE COM-
PANY OF HAWAII,
LIMITED

By /s/ [Indistinguishable],
Its Attorney in fact,

[Seal] By /s/ CARL BAIRD,
Attorney in fact.

[Endorsed]: Filed June 16, 1950.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
THE RECORD ON APPEAL

Upon consideration of the stipulation of the parties hereto and good cause shown, it is by the Court this 21st day of July, 1950, ordered that the time for filing the record on appeal with the United States Court of Appeals for the Ninth Circuit and the time for docketing said action in said Appellate Court, shall be extended to ninety (90) days from June 16, 1950, the day on which the appeal was noted herein.

/s/ D. E. METZGER,

Judge.

[Endorsed]: Filed July 21, 1950.

[Title of District Court and Cause.]

STIPULATION ABRIDGING RECORD
TO BE PRINTED

In this cause it is stipulated by and between the parties through their respective counsel for the purpose of abridging the printed transcript of record herein on appeal to the United States Court of Appeal for the Ninth Circuit, that although there is no showing that the Defendant had knowledge thereof, all of the checks drawn by Waipahu Auto Exchange, Limited, on its account in the Waipahu

Branch, Bank of Hawaii, during the period of its corporate existence, were signed as follows:

WAIPAHU AUTO
EXCHANGE, LTD.

By /s/ T. YOKONO,
Treasurer.

Countersigned:

By /s/ F. H. SHINTAKU,
Vice-President.

(Bank of Hawaii is an independent bank and
in no manner affiliated with Defendant.)

Dated: Honolulu, Hawaii, this 29th day of
August, 1950.

FEDERAL SERVICES
FINANCE CORPORATION,
Plaintiff-Appellant.

By /s/ WILLIAM W. SAUNDERS,

By /s/ EDWARD Z. BUCK,
Its Attorneys.

BISHOP NATIONAL BANK OF
HAWAII AT HONOLULU,
Defendant-Appellee

By /s/ J. RUSSELL CADES,

By /s/ H. BAIRD KIDWELL,
Its Attorneys.

[Endorsed]: Filed August 29, 1950.

In the United States District Court
For the District of Hawaii
Civil No. 947

FEDERAL SERVICES FINANCE CORPORATION,
a Delaware Corporation,
Plaintiff,

vs.

BISHOP NATIONAL BANK OF HAWAII AT
HONOLULU, a National Banking Association,
Defendant.

Before: Hon. Delbert E. Metzger,
Judge.

Appearances:

WILLIAM W. SAUNDERS, ESQ.,
EDWARD Z. BUCK,
1160 Bishop Street,
Honolulu, T. H.,
Appearing for the Plaintiff.

J. RUSSELL CADES, ESQ.,
Bishop Trust Building,

H. BAIRD KIDWELL,
Bank of Hawaii Building,
Honolulu, T. H.,
Appearing for the Defendant.

TRANSCRIPT OF PROCEEDINGS

March 15 and 16, 1950

The Clerk: Civil No. 947, Federal Services
Finance Corporation, a Delaware corporation,

Plaintiff, vs. Bishop National Bank of Hawaii at Honolulu, a national banking association, Defendant, for trial.

Mr. Buck: Ready for the Plaintiff, your Honor.

Mr. Cades: Ready for the Defendant, your Honor.

Mr. Buck; If the Court please, under Rule 15 I would like at this time to file with the Court an amended complaint, which has been consented to by Counsel for the defendant.

Mr. Cades: If your Honor please, in consenting to the filing of the complaint, I stated to Counsel that I wanted to reserve the right to file, if I saw fit, within forty-eight hours, an amended answer, if one were necessary, but in order not to delay the trial I was quite willing to have our answer to the original complaint stand as an answer to this complaint, with the right to file an amended answer within, say, forty-eight hours.

The Court: All right.

Mr. Buck: Do I understand from Counsel for the defendant that we may proceed on the basis that you have admitted all of the matters that you have admitted in your original answer and that you allege all the matters that you allege in your original answer?

Mr. Cades: That is correct, the answer stands, but subject to my right, by reason of the filing of an amended complaint, to file an amended answer within a reasonable time.

Mr. Buck: May it please the Court, Mr. William W. Saunders, an associate of the firm of Lewis,

Kimball & Buck, will be associated with me in the trial of the case and will conduct the case for the plaintiff, as principal attorney.

Mr. Saunders: May it please the Court, to simplify matters, the amended complaint filed by the plaintiff this morning changes very little the language of the original complaint, with the exception that, referring to page 2 of the original complaint, there is added one more check under paragraph 3, the check being Check No. VH 9435, dated February 17, 1949, in the amount of \$1,537, which should go in between 2 and 3 of the original complaint.

The only other changes have to do with the amount of the demand being increased by the amount of \$1,537, and we made minor changes in the language of paragraph 2, wherein we alleged that not only did we have money on deposit as alleged in our original complaint, but also that the money on deposit was in excess of the amounts of the checks listed here and "all other checks drawn by the plaintiff on the defendant bank when presented for payment."

The Court: Yes. [2*]

Mr. Saunders: Likewise, in our last paragraph, page 4, we made a minor change in that we say there is due and owing to the plaintiff the sum of \$17,726. That is the same sum we alleged in our original complaint, except it is increased by the sum of \$1,537; and we state that in addition to the \$17,726 owing, there is also owing the amounts admitted by the bank in their monthly statements.

The Court: What was that last statement?

Mr. Saunders: Well, "By reason of the fore-

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

going there is now due, owing and unpaid from defendant to plaintiff the sum of \$17,726.00 in addition to sums admitted by defendant to be owing to plaintiff by reason of said commercial checking account maintained by plaintiff in defendant's said bank."

In other words, plaintiff is still maintaining a current checking account with defendant bank.

The Court: Well, you don't have to sue for that.

Mr. Saunders: No, we aren't suing for that, and we want to make it clear that this suit did not cover any such sums. In other words, we say there is due and owing \$17,726, which we are now suing for. The rest is admitted in their monthly statements as due and owing.

The Court: Yes.

Mr. Saunders: The case presented this morning, if your Honor please, is one by a drawer maintaining an account [3] in the Bishop National Bank of Honolulu, or, rather, the Bishop National Bank of Hawaii at Honolulu.

The way the case arose, the plaintiff wrote a series of checks payable to Waipahu Auto Exchange, Limited. These are the checks that are enumerated in our amended complaint. The checks were then paid, either in cash directly by defendant bank, or by another bank and run through the bank clearing house, so that they were ultimately paid by the defendant bank in each case, and they were charged against the account of the plaintiff.

We are proposing to prove, or we feel that under

the law it is necessary first to prove merely these facts:

First, that deposits of these amounts were made in the defendant bank;

Secondly, that over and above admitted charges that the bank made, that is, admitted justified charges that the bank made against this account, that the plaintiff now questions and denies that the amounts represented by these checks were rightfully charged against the account.

Under the law we also will prove—It is admitted, as a matter of fact, that the demand was made by the plaintiff against the defendant for the repayment of these sums represented by the 12 checks, the aggregate demand being \$17,726. Under the law we understand that that sets up a debtor-creditor relationship, that it then is incumbent upon the bank to go [4] forward with the proof and show that payment was made on the depositor's order, according to the depositor's order.

However, to further clarify the thing, we intend to put these checks in evidence, so that there will be before the Court just what the nature of the demand is and how the dispute arose, and we will make a showing that the person who cashed these checks was not, in fact, authorized to cash these checks.

The Court: The person who cashed the checks was not in fact——

Mr. Saunders: Authorized. These checks were made payable to Waipahu Auto Exchange, Limited. We will show, by introducing checks, they were all

endorsed on the back, "Waipahu Auto Exchange, Limited by Anthony Yee, president." We will show that Anthony Yee, president, was not authorized to endorse and receive cash for these checks.

The Court: Was that a fact that was known to the bank?

Mr. Saunders: That he was not authorized?

The Court: That he was not authorized.

Mr. Saunders: That is a matter of their proof, your Honor. We think it is immaterial whether they did or not. The duty of a bank to its depositor is to pay only according to the depositor's order, and failure to do that gives rise to liability on the part of the bank. The bank [5] must, at its peril, identify the payee.

The Court: This man was not president?

Mr. Saunders: He was president, but not authorized to endorse these checks and receive cash for that.

The Court: It seems to me from that statement that a bank would be in great jeopardy in cashing any corporation or firm checks.

Mr. Saunders: They certainly would, and that is why the usual procedure is to run these checks through a corporation account.

The Court: Was that fact disputed, that this man was not in authority?

Mr. Saunders: That's right.

The Court: To sign the check as president?

Mr. Saunders: That is right, the bank disputes that.

The Court: You claim he is not?

Mr. Saunders: We claim it merely to clarify the issue. Under the law we only have to set up a debtor-creditor relationship and show we made demand for the repayment of the debt and that the demand was refused.

The Court: Hadn't you drawn an order against the bank for the payment of these checks?

Mr. Saunders: It is a part of the regular doctrine in law, if your Honor please, that payment is an affirmative [6] defense. We have drawn an order on the bank telling them to pay to Waipahu Auto Exchange, Limited. We contend they did not pay to Waipahu Auto Exchange, Limited, but they paid to one Anthony Yee, who represented to the Bank that he was authorized to sign for Waipahu Auto Exchange, Limited.

The Court: Well, who would be authorized to sign it?

Mr. Saunders: We will show that by the by-laws, if your Honor please.

The Court: Well, must a bank be familiar with all the by-laws of every depositor?

Mr. Saunders. As we understand the law, and we will cite authority, the bank, at its peril, must identify the payee. It is incumbent upon the bank, when a check is presented by any person, whether it is an individual or corporation, to ascertain that that person is either the payee named or is authorized by the payee to receive payment for that check.

The Court: Well, if the president of the corporation can't identify the corporation, what officer can?

Mr. Saunders: Usually, if your Honor please,

in any corporation the authority for management is split. The president will have certain duties, and usually the financial end of the corporation is left up to one or more persons under the department of the treasurer. For instance, American Factors——[7]

The Court: Does the president have any other office besides that of president?

Mr. Saunders: In this case he was sales manager.

The Court: Well, go ahead with your proof then, unless the defendant wants to make a statement.

Mr. Cades: If your Honor please, I think it would simplify it if I made a very short statement. By "short" I mean Counsel has neglected to summarize the pleadings and I think it would help your Honor if we went over what is admitted and denied, for it is an extremely technical case.

The plaintiffs have been defrauded by President Anthony Yee. The proof will show that they have been misled into issuing a series of checks to him for a lot of cars that were non-existent. Having discovered that they were defrauded after five or six months of conduct with one Anthony Yee, President Anthony Yee, they come into court and say "Our losses for being defrauded must now fall on the bank." And the reason for making that assertion is that the bank doesn't have on file any resolution showing that Anthony Yee could cash checks.

Our case will consist of at least five or six defenses any one of which should be sufficient to show that the liability is not on the bank. The first is, of course, that not only by a course of conduct and by

everything that the plaintiff in this case ever did the President Yee was authorized, [8] but they themselves cashed one of the checks, as will appear by the proof. If that doesn't, as a matter of law, once and for all and without any question of further proof establish the right of the bank to do what they themselves have done, to wit, cash a check, why there just isn't any law on the subject.

Second, if it is necessary, I think the proof will show that there was extreme negligence on the part of the Plaintiff in the issuance of these checks, and it is their own negligence that resulted in their loss, not the actions of the bank.

And, third, that in any event, I think the proof will show that it will be impossible for the plaintiffs to sufficiently sustain the burden that they have of showing, in the words of Mr. Saunders, the president was not authorized to cash the checks.

That is what the case is about, your Honor.

I have in front of me the old complaint, but I think it would be just as well to save the time.

Paragraph 1 is the formal allegation of incorporation and jurisdiction. That has been admitted. It was also admitted in the amended complaint.

Paragraph 2 alleges that the bank carries on a banking business and that they maintain——

The Court: That it is a national bank.

Mr. Cades: They have alleged in the amended complaint [9] that it is a national banking association. The actual jurisdiction in this case, your Honor, in this court arises not by virtue of the fact that my client is a national bank, but by reason

of the fact that plaintiff is a Delaware corporation. For purposes of jurisdiction of this court, your Honor will no doubt recall that my bank here is considered a local resident, but there is diversity alleged and we have not denied it, and the court does have jurisdiction under the diversity clause.

They have set up a new allegation, which I don't think is controvertible, that they have always had enough money in the bank to pay all checks that are drawn on the account. That is not denied. The amended answer will admit that specifically.

No. 3 is the——

Mr. Saunders: May I clarify that now, Mr. Cades, and ask that you admit at this time that paragraph 2 in the amended complaint is as we allege, namely, the only change being that plaintiff at all times had money on deposit in excess of the amounts of the checks involved and all other checks drawn by plaintiff on defendant bank when presented for payment.

The Court: Well, that is admitted.

Mr. Cades: That is admitted.

Mr. Saunders: That is admitted. [10]

Mr. Cades: Paragraph 3, the allegation of the drawing of the checks on the dates and the times admitted. That is admitted by our answer already on file.

Paragraph 4, that each of the checks was payable to Waipahu Auto Exchange, which is a corporation organized under the laws of the Territory. That has been admitted.

Paragraph 5 I would like to read, your Honor.

In both complaints the allegation is that "on or about the respective dates of said checks one Anthony Yee—" otherwise unidentified in the complaint "—took said checks and wrongfully, and without any right, authority or permission, endorsed each thereof in blank with the name of the payee named therein.

By way of answer, the allegations are denied, so that of course that is in issue. And it is further averred affirmatively that "at all relevant times Anthony Yee was president of Waipahu Auto Exchange, Limited, a Hawaiian corporation, and the payee named in each of the checks herein referred to; that the checks referred to were delivered by the plaintiff to Anthony Yee in his capacity as president of Waipahu Auto Exchange, Limited; that the acceptance of delivery by Anthony Yee, in his capacity as president of said corporation, permission of the corporation; that said Anthony Yee, in his capacity as president of said corporation, did have actual, implied and apparent authority to receive said checks and to negotiate and endorse the same [11] and said Anthony Yee, as president as aforesaid, did in fact negotiate and endorse said checks and each of them; that the defendant had no knowledge of any limitation upon the authority of said Anthony Yee."

The Court: By saying that they were delivered to Anthony Yee, do you mean by that that they were delivered into his hand, or that they were sent by mail and that he was the recipient of them?

Mr. Cades: The proof will show, your Honor,

that they were physically delivered by the plaintiff to Anthony Yee, with whom the plaintiff did all the business.

Paragraph 6 of the complaint is that none of the checks were paid according to the terms of the check. That has been denied. That is put in issue by the answer.

Paragraph 7: On or about the respective dates of said checks, upon presentation thereof for payment, defendant wrongfully cancelled each said check and wrongfully deducted and withdrew the amounts of the checks from the account. That is the form in which that is alleged, and the answer says that the checks were cashed. It sets out that eight checks were cashed by the Bank of Bishop. All of these are set out in our answer, Your Honor. They will be identified. And that prior to the cashing of each of the checks, Anthony Yee was identified by an employee as being president of the Waipahu Auto Exchange, Limited, and at the time of the cashing [12] of each of said checks the defendant in good faith believed that said Anthony Yee, as president as foresaid, had authority to cash the checks, and relied upon representations made by Anthony Yee that he was cashing the checks for a corporate purpose, and had no knowledge of any limitation.

Further, we answer three of the checks were cashed by the Bank of Hawaii, and it is the same allegation on information as to what the Bank of Hawaii did, that they had them identified and cashed them.

The Court: What about the fourth one. There are twelve specified. Formerly there were but eleven. You have accounted for eleven.

Mr. Cades: There has been one added; and, if your Honor please, it is a little hard to know what the answer is. That is why we have reserved a right to file an amended answer. May I read the original answer. I think it will serve to clarify it. In the original answer we aver that in addition to the ones sued on, the plaintiff had also made demand upon us prior to the suit that we pay them \$1,537.

The Court: That is this check that has been added?

Mr. Cades: That is the check that has been added. We understood that as to that check that it got its money in full and therefore was not trying to get it again. I am not exactly sure what the facts will disclose, but for purposes of not interfering with the trial, I think it is one in a series [13] and we would deny that we wrongfully paid it. That is all we can do at this time, your Honor.

Mr. Cades: Going ahead to paragraph 8 they allege that prior to the commencement of this action, plaintiff tendered the checks to the defendant and demanded the repayment thereof. There is no dispute about tender and demand.

Paragraph 9 is an allegation that we owe them the money.

Mr. Saunders: May I ask if Counsel for defendant now admits that demand was made of defend-

ant that defendant repay the plaintiff the sum of \$17,726 and that said demand was refused.

Mr. Cades: Is he asking whether we admit the demand was refused?

Mr. Saunders: I am asking whether you admit the demand of this sum as represented by these checks and also that the demand was refused by the bank.

Mr. Cades: Yes, we admit we refused to pay the sums.

The Court: Are you ready to put on witnesses now?

Mr. Saunders: Yes, if your Honor please.

The Court: Just get your witness ready. Before that we will take a brief recess now.

(Recess had.)

LLOYD EDWARD HOLLOWAY, JR.

called as a witness on behalf of the plaintiff, being first [14] duly sworn, was examined and testified as follows:

The Clerk: Just sit down, please.

Direct Examination

By Mr. Saunders:

Q. Will you state your full name, please.

A. Lloyd Edward Holloway, Jr.

Q. What is your occupation?

A. Manager of the Honolulu branch, Federal Services Finance Corporation.

(Testimony of Lloyd Edward Holloway, Jr.)

Q. How long have you been in that occupation?

A. You mean in that capacity?

Q. In that capacity.

A. Since August 1, last year.

Q. That is 1949? A. Yes.

Q. And when did you come to the Territory of Hawaii?

A. January 15, last year, 1949.

Q. Where did you work when you first came to the Territory? A. Federal Services.

Q. What was your capacity at that time?

A. I suppose you would call understudy to Mr. Gillespie prior to taking over as manager.

Q. Were you sent down to take over the managership? A. That's correct. [15]

Q. And you were in a training period, or marking time, until Mr. Gillespie left; is that correct?

A. Correct.

Q. Mr. Gillespie was former manager of the Honolulu branch of Federal Services Finance Corporation? A. That is correct.

Mr. Saunders: If your Honor please, Counsel for the defendant has admitted these various documents. They are the banks statements rendered by Bishop National Bank, the defendant, to Federal Services Finance Corporation, the plaintiff, statements of the account that the plaintiff maintained in the defendant bank for the months January to May, inclusive, for 1949. I would like to introduce them into evidence as Plaintiff's Exhibit A-1, 2, 3, 4, and 5.

(Testimony of Lloyd Edward Holloway, Jr.)

The Court: Yes, I understood that the Bank admitted that in the answer.

Mr. Saunders: I have just shown them to them.

Mr. Cades: We have no objection to their going into evidence, your Honor.

The Clerk: Plaintiff's Exhibit A-1.

Mr. Saunders: A-1 would be January, 1949. A-2, February, 1949, and so forth.

The Clerk: A-1 is January.

The Court: To May? Including May?

Mr. Saunders: Including May, your Honor, 1949. [16]

(Thereupon, the documents above referred to were received in evidence as Plaintiff's Exhibit A-1, A-2, A-3, A-4, and A-5.)

Q. (By Mr. Saunders): Mr. Holloway, are you familiar, as manager of the local branch of Federal Services Finance Corporation, with the banking practices followed by your concern? A. Yes.

Q. And during the months January through May, 1949, were you familiar with the practices of the corporation in that regard?

A. Not entirely.

Q. In your capacity, as an understudy to the manager, you did have general familiarity with it, did you not?

A. That's correct.

Q. Since that time, since the months January through May, 1949, have you had occasion to re-examine the statements that the Bishop National Bank rendered to your corporation concerning the

(Testimony of Lloyd Edward Holloway, Jr.)

account of Federal Services Finance Corporation, Honolulu Branch, with the defendant bank?

A. I have.

Q. I show you Plaintiff's Exhibit A-1, the January statement, January, 1949, and ask you if you examined that prior to coming to court.

A. Yes. [17]

Q. Do you admit that all of the checks charged against your account were paid according to the order of the checks drawn?

A. Yes, with the exception of the one checked in red.

Q. And what is the date of that check, the date it was cashed?

A. January 21.

Q. And what is the amount of the check?

A. \$1,337.

Q. I show you Plaintiff's Exhibit A-2, being the February statement that the Bank rendered to Federal Services Finance Corporation, covering your account with Federal Services Finance Corporation, and have you examined this statement prior to coming to court?

A. Yes.

Q. And which, if any, charges against your account by reason of checks drawn there do you admit?

Mr. Cades: If your Honor please, I didn't want to object as to form. I am trying to hasten the thing. But I do object now. That is merely asking this witness for a conclusion of law. I think the testimony should be on question and answer what he did or what he said. Your Honor and ourselves will have to "thrash that out."

(Testimony of Lloyd Edward Holloway, Jr.)

Mr. Saunders: If your Honor please, we are merely trying to show that in this case the plaintiff is denying [18] that certain amounts were paid according to its order, and we are showing that by his perusal of these bank statements and to clarify which of these checks he is denying were paid according to his order, and we are showing this by check marks on these statements and identifying what those check marks represent.

The Court: Well, you claim that all these 12 checks were erroneously paid. That is denied. Why is it necessary to go over the bank statements to identify them. They have been sufficiently identified.

Mr. Saunders: We would like, if your Honor please, to show that they admitted the payment of these checks other than these twelve; therefore, the debtor-creditor relationship has been established as to these twelve, and that we have made a demand on these twelve.

The Court: They admit you made a demand and they refused your demand.

Mr. Saunders: We are also showing that the balance above the admitted amounts represents \$17,726, in other words, the amount admitted by our own people as being justifiable charges.

The Court: Well, it seems to me like that is a long, tedious way of getting around to get in the record something that is already in it in substance.

Mr. Saunders: This merely involves bank statements [19] for five months, and it only involves

(Testimony of Lloyd Edward Holloway, Jr.)

twelve individual check marks, which won't take long to get in the record, if your Honor please.

Mr. Cades: I think, your Honor, to save time, if the witness wants to put a red circle around the checks which identify them on the bank account, I think he can be asked to do it.

The Court: It seems to me that is about the best way. We will take up an hour here going through the rigmarole to identify each check.

Q. (By Mr. Saunders): Mr. Holloway, will you take these plaintiff's Exhibits A-1 through A-5 and draw a blue circle around each of the checks which were paid and which amounts you now dispute. (Witness writing.)

Have you completed that, Mr. Holloway?

A. Yes.

Mr. Saunders: If your Honor please, it is further confused a little bit by the fact that there is already a blue circle around one of these in ink. I would like to ask Mr. Holloway if they are further identified by red check marks before coming into court.

The Court: That accounts for all twelve checks?

Mr. Saunders: Yes. May I have permission to ask that question.

The Court: Yes. [20]

Q. (By Mr. Saunders): Mr. Holloway you have made circles around twelve checks, blue circles around amounts representing twelve checks paid by the bank during the months of January through May, 1949. Opposite, also, each of those charges is a red pencil check mark. Are those the checks

(Testimony of Lloyd Edward Holloway, Jr.)

that you now deny the bank paid according to your order? A. That's correct.

The Court: Will you ask this question, too: Were those the only checks that were issued during this five months, January to May, inclusive, by the plaintiff to the Waipahu Auto Exchange?

Q. (By Mr. Saunders): Will you answer the Court's question. A. No.

The Court: There were other checks issued?

The Witness: Yes, sir.

The Court: To the same payee?

The Witness: Yes, sir.

Q. (By Mr. Saunders): How many other checks, Mr. Holloway?

A. I couldn't say exactly. Approximately 5.

Q. Is it correct that there were two more checks?

Mr. Cades: Did he say "possibly 5"?

Q. Isn't it a fact, Mr. Holloway, that there were two more checks? [21]

Mr. Saunders: Counsel for the defendant has examined all the checks and I believe he will stipulate there were fourteen in all.

Mr. Cades: If your Honor please, I am in no position to stipulate that. They showed us various other checks and they showed us fourteen. I don't know what the facts are. I think that ought to be brought out by proof.

Q. (By Mr. Saunders): Mr. Holloway, did you show to the defendant all of the checks which your corporation drew payable to Waipahu Auto Exchange during those months? Isn't it a fact that they came and examined all of the records pertain-

(Testimony of Lloyd Edward Holloway, Jr.)

ing to Waipahu Auto Exchange that you had in your file? A. Yes.

Q. Didn't you at that time show them all of the checks you had that were made payable to Waipahu Auto Exchange and didn't those number fourteen in number?

A. I believe that is correct.

Q. And twelve of those fourteen are now the subject of this suit; is that correct?

A. That's true.

Q. Have you finished examining these checks?

A. Yes.

Mr. Saunders: Do you have any objection to their going into evidence?

Mr. Cades: No. [22]

Mr. Saunders: At this time, if your Honor please, defendant has no objection to the introduction in evidence of these checks which are enumerated in our amended complaint, being checks drawn by Federal Services Finance Corporation on defendant bank payable to Waipahu Auto Exchange, Limited, during the months January through May, Inclusive, 1949. We ask that they be introduced into evidence and marked Plaintiff's Exhibit B-1 through 12, and that the numbers 1 through 12 correspond with the numbers in our amended complaint. They are now in chronological order for the Court's convenience.

(Thereupon, the documents above referred to were received in evidence as Plaintiff's Exhibit B-1 through B-12.)

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HONOLULU, T. H., JANUARY 21, 1949 No. VH 9007

7 DOLLARS \$1,337.00

WAI PAHU AUTO EXCHANGE, LTD.

BISHOP NATIONAL BANK OF HAWAII

HONOLULU, T. H.

By *[Signature]*

United States District Court
EXHIBIT B-1
Admitted 3-15-50

*Wagoner Auto Exchange
By Anthony J. [Signature]*

FEDERAL SAVINGS FINANCE CORPORATION

HOME OFFICE: WASHINGTON, D. C.



HONOLULU, T. H. FEBRUARY 10, 1940. V.H. 9316

FEDERAL SAVINGS FINANCE CORPORATION

TO THE ORDER OF

DOLLARS \$1500.00

OK. 128

WAIPAHU AUTO EXCHANGE, LTD.

FEDERAL SAVINGS FINANCE CORPORATION



BISHOP NATIONAL BANK OF HAWAII
HONOLULU, T. H.

BY *[Signature]*
MANAGER HONOLULU BRANCH

Waipahu Auto Exchange Ltd.

By

[Signature]
President

OK
symp

1500.00

1500.00

1500.00





HOME OFFICE: WASHINGTON, D. C.

HONOLULU, T. H., February 17, 1949 No. VH 9435

TELEPHONE
SERVICES FINANCE

221 537 BULLDOGS

DOLLARS \$ 1537.00

TO THE ORDER OF

WAIPAHU AUTO EXCHANGE, LTD.

FEDERAL SAVINGS FINANCE CORPORATION

WAIPAHU AUTO EXCHANGE, LTD.

BY *Franklin H. Baker*
VICE PRESIDENT



BISHOP NATIONAL BANK OF HAWAII
HONOLULU, T. H.

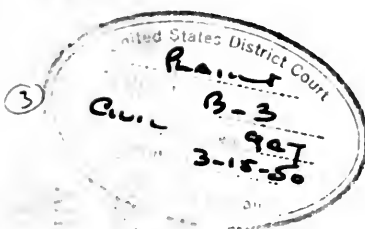
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WAIPAHU AUTO EXCHANGE LTD.

BY:

William J. ...
PRESIDENT

221 537 BULLDOGS





FEDERAL SERVICES FINANCE CORPORATION

HOME OFFICE: WASHINGTON, D. C.

HONOLULU, T. H. March 22, 1949 No. VH 9919

FEDERAL
SERVICES FINANCE

★ \$15,000.00 DOLLARS ★

\$1500.00

TO THE ORDER OF



WAI PAHAU AUTO EXCHANGE, LTD.

FEDERAL SERVICES FINANCE CORPORATION

BISHOP NATIONAL BANK OF HAWAII
HONOLULU, T. H.

BY

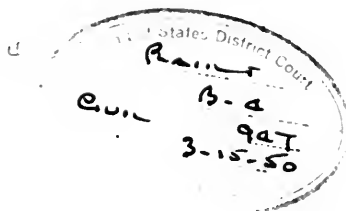
W. J. Gillespie

MANAGER HONOLULU BRANCH

56

Wayman Auto Exchange
By Anthony J. J.
Amend

RECEIVED
FEB 23 1950
ALL PAYMENTS
ON THIS ACCOUNT
ARE TO BE MADE
TO THE ORDER OF
BISHOP NATIONAL BANK OF HAWAII
HONOLULU, T. H.





HONG LULU. T. H. March 29, 1949

GENERAL SERVICES FINANCE

BOOK

WILSON'S BOOK CREDITORS \$1500.00

WATKINS AUTO EXCHANGE, LTD.

BISHOP NATIONAL BANK OF HAWAII
HONOLULU, T. H.

INTERNATIONAL BUSINESS CORPORATION

BY

MANAGER HONOLULU BRANCH

Waujahn Ant. Ex. St.
Big Anthony & Co.
President.

United States District Court
Hawaii
X-111111 B-5
Case No. 94T
Date 12-15-60
Hawaii





HOME OFFICE: WASHINGTON, D. C.

HONOLULU, T. H. March 31, 1949 NO. VH10065

FEDERAL RESERVE BANK OF NEW YORK
 SERVICES FINANCE
 *** 1437 DOLLARS *** 1437.00 CTS DOLLARS \$ 1437.00

TO THE ORDER OF

WAI PAHU AUTO EXCHANGE, LTD.

BISHOP NATIONAL BANK OF HAWAII
 HONOLULU, T. H.

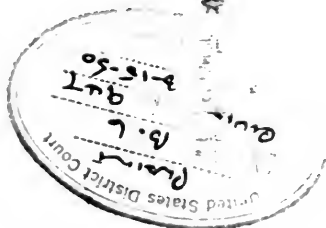
MANAGER HONOLULU BRANCH

APG:llayne

UNITED STATES DEPT. OF TREASURY

(Signature)

*Waipahu Auto & Ltd
 My Account per
 President,*



1437 DOLLARS
 1437.00 CTS





FEDERAL SAVINGS FINANCE CORPORATION

HOME OFFICE: WASHINGTON, D. C.

HONOLULU, T. H. APR 18, 1949 No. VH10157

FEDERAL
SAVINGS FINANCE

\$15,000.00

DOLLARS \$ 1,500.00

WAIPAHU AUTO EXCHANGE

FEDERAL SAVINGS FINANCE CORPORATION

BISHOP NATIONAL BANK OF HAWAII
HONOLULU, T. H.

BY

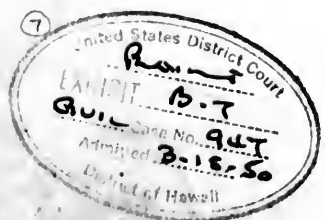
W. J. G. [Signature]

MANAGER HONOLULU BRANCH

Waigahau Ant & Hds
Bey Anthony & per
President

Anthony per

131-15-59131



●.VH10248

April 13, 1949

ИЗДАТЕЛЬСТВО

JOHN'S SQUARE
FIVE

DECEASED \$ 1,000.00

WAITPAGU AUTO EXCHANGE

Federal Supply Plus Contract

BISHOP NATIONAL BANK OF HAWAII
HONOLULU, T. H.

~~MANAGER MONOLITH BRANCH~~

Waujiolen Cutz 3x
By Country Year
Bundab

大正十一年

COLLECTION
DEPARTMENT
OF THE

United States District Court
Phoenix
EXHIBIT
Q. 1-8
947
947

NO. VH10576

HONOLULU, T. H. May 6, 1949

FEDERAL
SERVICES FINANCE

FEDERAL SERVICES FINANCE CORPORATION

1,240.00

TO THE ORDER OF

WAIPAHU AUTO EXCHANGE, LIMITED

FEDERAL SERVICES FINANCE CORPORATION

BISHOP NATIONAL BANK OF HAWAII
HONOLULU, T. H.

BY

W. J. Sullivan

MANAGER HONOLULU BRANCH

FORM 1-15-48 10-10-48

61

*Waipahu Auto & the
By Anthony J. Sullivan
President*

(6)

250

1048

1048

United States of America
Prime
13-9
94T
3-15-50

POST OFFICE: WASHINGTON, D. C.

No. VH10733

HONOLULU, T. H., MAY 17, 1949

FEDERAL SERVICES FINANCE

DOLLARS \$ 1,200.00

MAIPARU AUTO EXCHANGE, LIMITED

R.J.B.

SISHOP NATIONAL BANK OF HAWAII
HONOLULU, T. H.

FEDERAL SAVINGS FINANCE CORPORATION

BY *Amehakehata*
HONOLULU, HAWAII

*Waiparua Auto Exh
Certifying you
Prescribed.*

*Justifying
Sung*

ORDER
ANY BANK, BANKER OR TRUST CO.
PRIOR ENDORSEMENTS GUARANTEED

MAY 17 49 4005

U.S. BANK OF HAWAII
HONOLULU, T. H., U.S.A.

United States District Court
Paine
 EXHIBIT B-10
 Case No. 947
 Admitted 3-15-50
 District of Hawaii



HONOLULU, T. H. MAY 19, 1949

No. VH10770

HONOLULU, T. H. MAY 19, 1949

* * 248010'S * * * * *

3

* * 248010'S * * * * *

FEDERAL
SERVICES FINANCE

TO THE CREDIT OF

WAIPAHU AUTO EXCHANGE, LIMITED

EXCHANGE DEPT. 44

BISHOP NATIONAL BANK OF HAWAII
HONOLULU, T. H.

BY

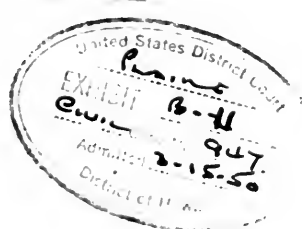
W. J. Gilligan

MANAGER HONOLULU BRANCH

FORM 1-10-48 (10-10-48)

*Waipahu Auto Ex. Ltd
By Authority of
Shenandoah*

* * * * *

* * * * *
ANY BANK, BANKER OR TRUST CO.
* * * * *
* * * * ** * * * *
MAY 19 49 1007* * * * *
BANK OF HAWAII
HONOLULU, HAWAII, U. S. A.



NOT A FIDELITY GUARANTEE

NO. VH10774

HONOLULU, T. H. MAY 19, 1949

FEDERAL RESERVE NOTE

1495.00

3

FEDERAL RESERVE NOTE

WAIKAPU AUTO EXCHANGE, LIMITED
EXCHANGE DEPT.

BISHOP NATIONAL BANK OF HAWAII
HONOLULU, T. H.

BY *W. J. Gilligan*
MANAGER HONOLULU BRANCH

*Waigahua Auto & Tel
Pay Anthony Lee
Omond*

ANY BANK, BANKER OR TRUST CO.
THIS CHECK IS GUARANTEED
MAY 19 1949 1007

BANK OF HAWAII
HONOLULU, HAWAII, U.S.A.

Ph...
B-12
94
2-12-50
Adm



(Testimony of Lloyd Edward Holloway, Jr.)

Mr. Saunders: We have no further questions of Mr. Holloway at this time.

Mr. Cades: What were the exhibit numbers, Mr. Clerk, please?

The Clerk: B-1 to B-12.

The Court: The first one is A, is it?

The Clerk: A is the bank statements.

The Court: Yes. And there are B's.

The Clerk: Photostatic checks. B series.

Mr. Saunders: As I understand it, B-1 through B-12 you can just run down the checks listed in our amended complaint and those are the exhibits. [23]

Cross-Examination

By Mr. Cades:

Q. Mr. Holloway, do you have the other two checks with you that were shown to us in the examination of your files? A. No.

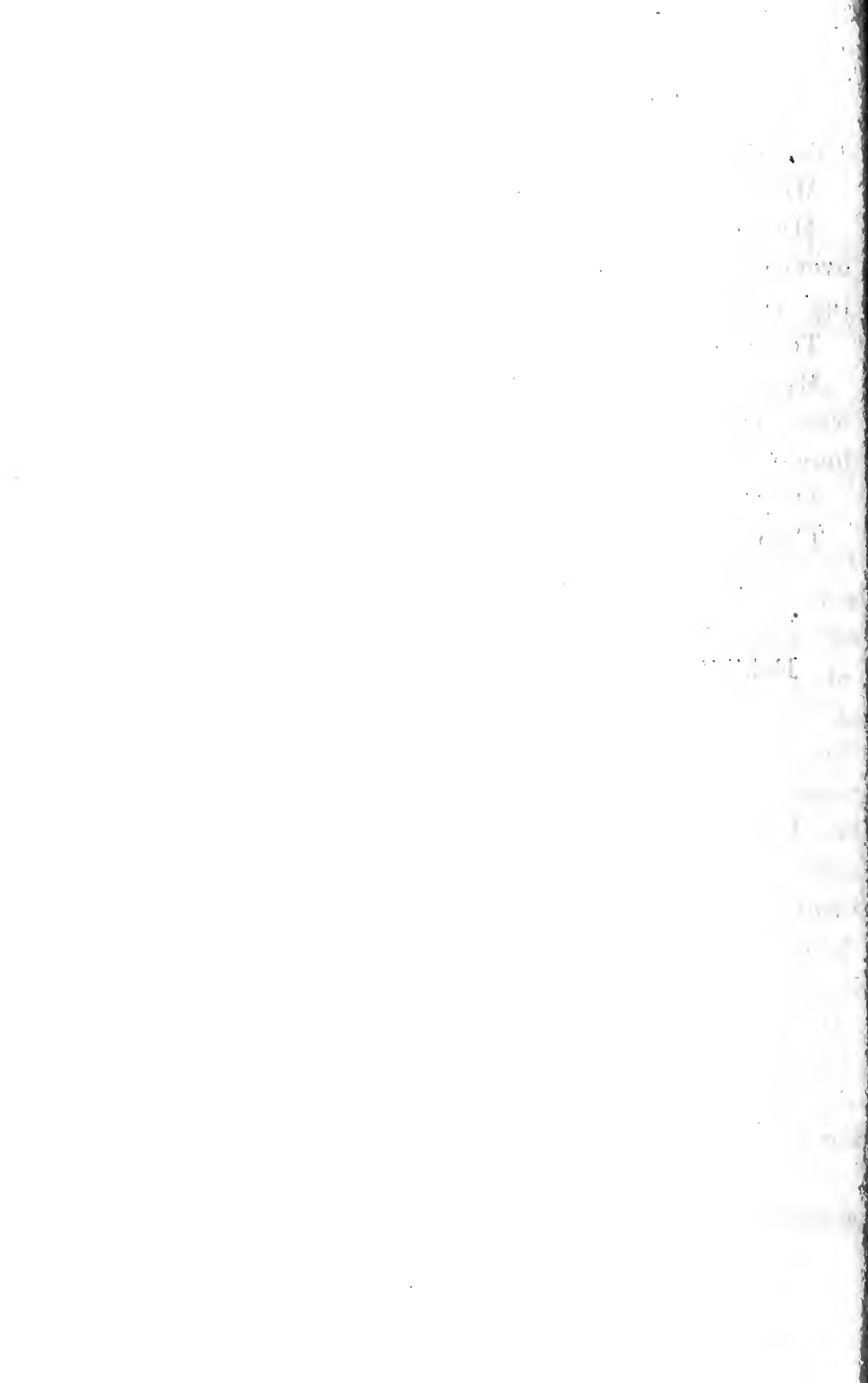
Mr. Saunders: I have them in my possession.

(Handed to Counsel.)

Q. (By Mr. Cades): I show you check of February 2, 1949, issued by Federal Services Finance Corporation to Waipahu Auto Exchange, Limited; on the back of it is the endorsement for deposit Waipahu Auto Exchange, Limited, by F. H. Shin-taku. I will ask you whether that is one of the checks you referred to in your direct examination, your direct testimony.

A. That would be one of the fourteen checks.

Q. That is one of the fourteen.



6-58

FEDERAL
SERVICES FINANCE

HONOLULU, T. H. FEBRUARY 2, 1949 No. VH 9186

DOLLARS \$1337.00

WAIPAHU AUTO EXCHANGE LTD.

THE HAWAIIAN TRUST COMPANY

MANAGING DIRECTOR

BY *W. J. McGuire*

BISHOP NATIONAL BANK OF HAWAII
HONOLULU, T. H.

Deposit
Waipahu Auto Exchange Ltd.
By F. H. Shuntaker

PAY TO THE ORDER OF
ANY BANK, BANKER OR TRUST CO.
ALL PRICES ENCLOSURES GUARANTEED

FEB 5 1949

BANK OF HAWAII
WAIPAHU BRANCH

PAY TO THE ORDER OF
ANY BANK, BANKER OR TRUST CO.
ALL PRICES ENCLOSURES GUARANTEED

FEB 5 1949

BANK OF HAWAII
HONOLULU BRANCH

EXHIBIT
Case No. 3-13-55
Admitted to Hawaii
District of Hawaii

United States District Court
District of Hawaii
No. 1
3-13-55



(Testimony of Lloyd Edward Holloway, Jr.)

Q. (By Mr. Cades): Mr. Holloway, I show you also a Federal Services Finance Corporation check drawn on the Bishop Bank, dated May 9, 1949. It is identified as VH 10605, is in the amount of 1445, purports to be endorsed on the back by Waipahu Auto Exchange, Limited, by Anthony Yee, President, shows under there Deposit to the account of Federal Services Finance Corporation. I will ask you whether that is the other check you refer to in your direct examination.

A. That would be the other check.

Mr. Cades: I offer this in evidence, your Honor.

Mr. Saunders: Your Honor, may I make the same objection on the same grounds as on the check just presented prior to this.

The Court: Overruled. It may be received.

The Clerk. Defendant's Exhibit No. 2.

(Thereupon, the document above referred to was received in evidence as Defendant's Exhibit No. 2.)



HONOLULU, T. H. MAR. 2, 1949 NO. VH10605

TO THE CREDIT OF

*** I 455 ***

DOLLARS \$ 1,455.00

WAIPAHAU AUTO EXCHANGE, LIMITED
BISHOP NATIONAL BANK OF HAWAII
HONOLULU, T. H.

BY *[Signature]*
MANAGER HONOLULU BRANCH

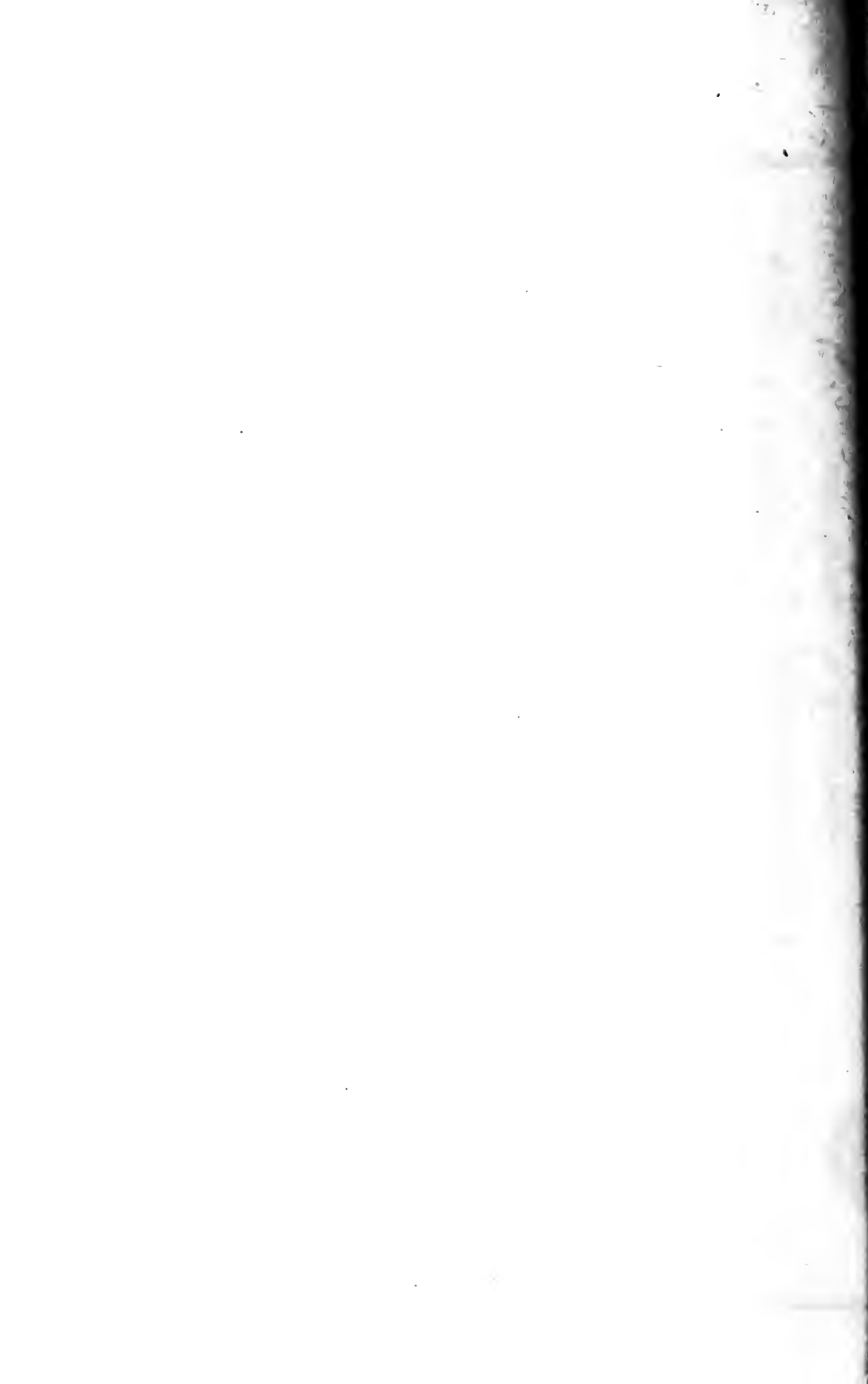
Admitted March 15, 1950.

26A

*Virginia Auto & the
by Anthony C. per
Brennan*

FOR DEPOSIT ONLY
ACCOUNT OF
FEDERAL RESERVE BANK OF HONOLULU

DEFENDANT'S EXHIBIT NO. 2



(Testimony of Lloyd Edward Holloway, Jr.)

Q. (By Mr. Cades): Mr. Holloway, you were understudying Mr. Gillespie in the early part of 1949, I think you testified.

A. That's correct.

Q. Do you remember the date that you arrived in the territory. [26]

A. January 13, 1949.

Q. January 13. And did you go to the place of business of the Federal Services Finance Corporation every day?

A. That is true.

Q. You knew Mr. Yee?

A. Yes.

Q. During that time you were understudying Mr. Gillespie you had access to all of the records of the corporation?

A. That's correct.

Q. I ask you to look at Exhibit No. 2, which is the check of May 9, 1949, and I will ask you whether it isn't a fact that Mr. Yee cashed that check in the offices of Federal Services Finance Corporation.

A. That's correct.

Q. When Mr. Yee cashed the check, what did the Federal Services Finance Corporation do with the check? Did it just cancel it, or what?

A. It was deposited to our account.

Q. It was deposited to your account in the Bishop Bank?

A. Yes.

Q. And the purpose of that deposit was to show that a payment had been made under the check to the Corporation; isn't that right?

A. Payment had been made to Anthony Yee. [27]

Q. Just listen closely to the question again. When the check was paid by the delivery of cash to Anthony Yee, you then deposited it to the account,

(Testimony of Lloyd Edward Holloway, Jr.)
to your account, the Federal Services Finance Corporation, in the Bishop Bank; that's correct, isn't it? A. Yes.

Q. What was the purpose of that deposit in the Bishop Bank account?

A. What was the purpose of depositing the check?

Q. Yes. It had already been paid. It was your own check, and you nevertheless put it through the bank account. What was the purpose of that?

A. To account for the cash paid to Anthony Yee.

Q. To account for the cash paid to Anthony Yee. And when that check was cashed, you cashed it because you were making payment to Anthony Yee and not to the Corporation?

A. Payment was made to Anthony Yee.

Mr. Saunders: Your Honor, that calls for a conclusion of law, not a question of fact on the part of the witness.

Mr. Cades: I am trying to ferret the truth out of the witness, your Honor, as to what happened in this transaction.

The Court: Proceed.

Q. (By Mr. Cades): You deposit through your account all [28] checks that are received, do you not?

Mr. Saunders: If your Honor please, may I ask that Counsel step down so I can hear and see what the witness is saying.

Mr. Cades: I beg your pardon.

Q. (By Mr. Cades): As a matter of fact, didn't your Corporation want to have a check record of

(Testimony of Lloyd Edward Holloway, Jr.)

the fact that you had disbursed—May I see the check a minute (Handed to Counsel)—had disbursed the amount of \$1455 to the Waipahu Auto Exchange, Limited? A. Yes.

Q. You have voucher checks, don't you—Do you know what voucher checks are? A. Yes.

Q. Do you have the voucher that was attached to Exhibit No. 2, that was originally attached to this check?

A. You mean the duplicate of that check, the carbon?

Q. The carbon showing the voucher.

A. Yes.

Q. Would you produce it, please. I think you have it over here. A. We don't have it.

Mr. Saunders: If your Honor please, I am going to object to this entire line of questioning as going beyond the scope of cross-examination. We have merely put Mr. Holloway [29] on for the purpose of putting on certain documents and denying certain payments. If Mr. Cades wants to call Mr. Holloway as his own witness, he can do that, but I think at the present time the proper procedure would be for us to complete our case.

The Court: Well, I agree with you there, but since he has started on this, I assume he is just about through, and after all it is just a matter of saving time at the end. I do admit it is a slight interruption to your procedure.

Q. (By Mr. Cades): I show you, produced from the records of your Corporation, what pur-

(Testimony of Lloyd Edward Holloway, Jr.)
ports to be a duplicate of a voucher check for Check No. VH 10605 and ask you whether you can identify that as a duplicate of a voucher check issued at the time that Exhibit No. 2 was issued.

A. Yes, this is a duplicate of that check.

Q. Before I introduce it, will you state what the check was issued for to the Waipahu Auto Exchange, Limited?

A. What the check was issued for?

Q. Yes.

Mr. Saunders: If your Honor please, I object to this entire line of questioning again. Same objection: It is irrelevant and immaterial what went on between Waipahu Auto Exchange—

The Court: Direct your objection to the particular [30] question that is before the Court.

Mr. Saunders: I object to the particular question, if your Honor please, in that it is irrelevant and immaterial.

The Court: It does appear to me to be irrelevant. I don't see what the connection there is, what the check was issued for. We haven't inquired into what other checks were issued for.

Mr. Cades: If your Honor please, if I may show the relevancy, the record here will show that the duplicate of the voucher check shows that this was issued as the proceeds of a contract, Philman Laboratory, Ltd., which was sold to the Federal Services Finance Corporation. The purpose of this line of examination is highly relevant. The only purpose that the Federal Services Finance Corporation could possibly have had in endorsing and in

(Testimony of Lloyd Edward Holloway, Jr.)

depositing their own check, which was paid, would be in order to have a record through their bank account that Waipahu Auto Exchange——

The Court: That is already admitted by the witness.

Mr. Cades: But I want to show, your Honor, it was issued in the orderly course of business for the purpose of a contract of sale. Then we will show later, your Honor, by way of connecting, that every other check was issued for exactly the same purpose for a routine business transaction. The result of that testimony will be to show the “proof of the pudding” in our Answer, that the bank did exactly what [31] they themselves did. They dealt with Anthony Yee as he was, as he was president of the corporation, and the loss couldn’t be imposed upon the bank for doing what they themselves have done. That is the relevancy. I will make it as short as I possibly can. I just want to get in the evidence. Do you have any objection?

Mr. Saunders: We object to this as cluttering up the record and not being relevant to the issues. The issues are plain and simple: Did the bank pay according to the order or not according to the order and to some unauthorized person in an unauthorized manner? This has no connecting up with misleading the bank. It might tend to show, although I don’t believe it does, that there was negligence on behalf of the plaintiff in issuing the check, but there is no showing there was any negligence or misleading the bank in cashing the checks. The

(Testimony of Lloyd Edward Holloway, Jr.)
bank at all times had it within its power to avoid any liability.

The Court: Is it your plan to go through all these checks?

Mr. Cades: With this witness, your Honor, all I have in mind is to show the voucher check, get this in evidence. The very statement that Mr. Saunders made shows the relevancy. This is not introduced for the purpose of showing negligence. That is apparent.

The Court: I am asking you: Is it your intention [32] to go through at this time with this witness all of the checks and their vouchers?

Mr. Cades: It is my purpose——

The Court: Or just this one?

Mr. Cades: It is my purpose with this particular witness while he is on the stand to take every check that is contested and show exactly what happened, why it was issued.

Mr. Saunders: If your Honor please, I make the same objection that I made a little earlier, that that is properly a part of the defendant's case and is not within the scope of the cross-examination.

The Court: I think that is true. You had better get through with the witness on cross-examination and call him on direct.

Mr. Cades: Very well, then, in view of that ruling, your Honor, I will merely offer in evidence with Exhibit 2 the counterpart of it, which is the voucher showing the purpose for which it was issued.

(Testimony of Lloyd Edward Holloway, Jr.)

Mr. Saunders: If your Honor please, we make the same objection as we did on the offering of the check and make the further objection that this is offered on cross-examination, which is an improper means of offering any exhibit.

The Court: As a proper accompaniment of Exhibit 2, it is admitted. [33]

Mr. Saunders: What was the ruling, your Honor?

The Clerk: It is admitted. Exhibit 2-A.

(Thereupon, the document above referred to was received in evidence as Defendant's Exhibit 2-A.)

DEFENDANT'S EXHIBIT 2-A

H7633

Federal Services Finance Corporation .

Home Office: Washington, D. C.

Honolulu, T. H. May 9, 1949

No. VH 10605

Pay Dollars \$1,455.00

To The Order Of

Waipahu Auto Exchange, Limited

Federal Services Finance
Corporation

By.....

Asst. Manager Honolulu
Branch

Bishop National Bank of Hawaii

Honolulu, T. H.

Detach Before Depositing Check

(Testimony of Lloyd Edward Holloway, Jr.)

In Settlement of Proceeds of Contract—Philman
Laboratory, Ltd.

Charge

Check: \$1,455.00

Admitted March 15, 1950. [34-A]

Mr. Saunders: If your Honor please, we will excuse Mr. Holloway.

Mr. Cades: Just a minute. I am not finished. I still have some cross-examination.

Q. (By Mr. Cades): Mr. Holloway, you testified on direct examination that you had occasion to re-examine these bank statements. Would you mind telling us when you had occasion to re-examine the bank statements.

A. You mean for the period in question?

Q. That's right.

A. They were examined in detail today.

Q. Today. You are familiar, you said, with the so-called banking practices followed by your concern. Isn't it the practice of your concern to examine your bank statements when the bank statements come into the corporation at the end of each month? A. Yes.

Q. Who is the person who makes that examination?

A. You mean the name of the person, or job?

Q. Yes, who in your organization makes the examination? A. Mrs. Joyce Kishi. [34]

(Testimony of Lloyd Edward Holloway, Jr.)

Q. Joyce Kishi. What does she do it for? For purposes of reconciling the bank account?

A. That's correct.

Q. Does she make an examination of each of the vouchers to see that they have been properly returned?

A. She does now.

Q. She does now. Was your practice changed after the Yee incident?

A. Yes.

Q. Well, do you know when you began examining the bank statements to find out whether the vouchers were all proper and in order?

A. After this was uncovered.

Q. After this was uncovered. Prior to that time you made no examination of the vouchers? It was not customary in your firm to make an examination of the vouchers returned with the bank statement?

A. Just for purposes of reconciliation.

Mr. Saunders: If your Honor please, could we have that clarified? I don't think the witness knows what he means by "vouchers."

Q. (By Mr. Cades): Do you know what vouchers are that are returned with the bank statement?

A. I am not entirely familiar with that term.

Q. With the bank statement the returned checks are [35] sent back, are they not?

A. Yes.

Q. It was not the practice, I understand, of your Company up until quite recently to examine the returned checks; is that right?

Mr. Saunders: Am I to understand, your Honor,

(Testimony of Lloyd Edward Holloway, Jr.)
that Counsel means "check" when he says "voucher"? Is that what the witness is to understand?

Mr. Cades: I rephrased the question now substituting "bank checks" for "vouchers." I think it is quite apparent. This is a very intelligent witness. He is the head of the firm.

Would you mind reading the question.

(Question read.)

The Witness: You mean examine the endorsements?

Mr. Cades: Yes.

A. That is true.

Q. (By Mr. Cades): Well, was it your custom to do any more than reconcile a bank account by taking the balances? A. No.

Q. Is Mr. Gillespie available in the Territory as a witness? A. No, he isn't.

Q. He is not available. Where does he live now?

Mr. Saunders: If your Honor please, this is a [36] large court room and if Counsel has a tete-a-tete up there, we just can't hear.

Mr. Cades: I am sorry. I thought you could hear my voice.

Mr. Saunders: I can hear yours, but I can't hear the witness because he is speaking just to you.

Mr. Cades: Will you talk out loud, please.

The Witness: Yes. You asked if Mr. Gillespie was available in the Territory as a witness.

Mr. Cades: Yes, and you said "no."

The Witness: No.

(Testimony of Lloyd Edward Holloway, Jr.)

Q. (By Mr. Cades): And where is his present address? A. Washington, D. C.

Q. And how long was he manager of this concern?

A. From 1937 to 1941, and from 1946 until July of 1949.

Q. And you were sent down here—Was your replacing Mr. Gillespie accountable for by this so-called Yee incident, or did it have nothing to do with that? A. Nothing to do with it.

Mr. Saunders: Mr. Holloway—

Mr. Cades: Just a minute. If your Honor please, I would like leave to make this witness my own and pursue the matter further so that he can be cross-examined. I think it would save time to continue while he is on here. [37]

Mr. Saunders: If your Honor please, I don't think that would save time at all. We have witnesses in court who are waiting, and if we go into this entire line of inquiry that is properly a part of defendant's case, then we are going to be in court all day and our witnesses will be waiting.

The Court: I should tell you now I have got to get away at half past 11 and I can't resume this case until tomorrow morning at 10, so you may make the best of your time. In the face of the objection I can't allow it.

You are through with the witness now?

Mr. Saunders: No, your Honor.

(Testimony of Lloyd Edward Holloway, Jr.)

Redirect Examination

By Mr. Saunders:

Q. What does Mr. Gillespie do now, Mr. Holloway? A. He is vice president of the firm.

Q. And his offices are in Washington?

A. Yes.

Q. Where is the main office of your Corporation?

A. You mean the exact address?

Q. Where is it located, what general locality?

A. Washington, D. C.

Q. And is that where Mr. Gillespie is now?

A. Yes.

Q. Are you familiar with the exact procedure followed [38] by Mrs. Joyce Kishi—

Mr. Saunders: Or, let me reframe that.

Q. (By Mr. Saunders): Are you familiar with the procedure that Mrs. Joyce Kishi followed during the months January through May, 1949, in handling the return bank statement and the return checks? A. Yes.

Q. What would she do upon receiving the bank statement, together with the returned checks?

A. Just record the outstanding checks for purposes of reconciliation of the statement.

Q. Did she compare the amounts of the checks drawn against the amounts shown in the balance of the statement? A. Yes.

Q. Did she check the signature of the drawer; in other words, did she check the signature of the one who signed the check on behalf of Federal Services Finance Corporation?

(Testimony of Lloyd Edward Holloway, Jr.)

Mr. Cades: If your Honor please, I will object to that. If there is to be testimony about what she did or didn't do, specifically, except for the general practice, I think we ought to have the young lady here so we could cross-examine.

The Court: Well, of course she would be the best witness as to what she did.

Q. (By Mr. Saunders): Mr. Holloway, whenever a check [39] is issued by Federal Services Finance Corporation, do you as a matter of course run that through the bank account even though you paid cash for the check? That is to say, if one of your employees cashes a check drawn by you and payable to some payee, do you still run that through your account in the bank? A. Yes.

Q. Is the purpose of that to show what has happened to each of your checks? A. Yes.

Mr. Saunders: I have no further questions.

Mr. Cades: I have no further questions.

The Court: Your checks are all numbered in precise sequence, are they?

The Witness: Yes, sir.

The Court: So that you account in your records for every check issued?

The Witness: Yes, sir.

The Court: Suppose one becomes destroyed; mutilated, typed wrongfully, what do you do about that?

The Witness: Well, if we have been notified the check hasn't been received——

The Court: No, I mean in your own office before issuing.

(Testimony of Lloyd Edward Holloway, Jr.)

The Witness: It is canceled. [40]

The Court: Well, it is just destroyed and you begin with the next number?

The Witness: No, sir, we retain the check, but it is marked canceled.

The Court: These checks don't have any stub attached to the check, so you haven't any stub record; the record you have is this separate sheet, is it?

The Witness: Yes, sir.

The Court: And are these numbered the same as the checks are?

The Witness: Yes, sir.

The Court: The checks and these vouchers here come to you in a book form, do they?

The Witness: No, sir, they are loose, triplicate.

Mr. Saunders: Isn't it a fact, Mr. Holloway, that the vouchers, that is to say, the duplicate of the check, are kept in your files at all times and only the original goes through the bank?

The Witness: That's correct.

Mr. Saunders: We have no further questions of Mr. Holloway. If your Honor please, we have one witness to identify some documents. It would only take him three minutes.

The Court: All right, put him on.

(Witness excused.)

Mr. Saunders: Mr. Yokono. [41]

TAKESHI YOKONO

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Just sit down, please.

Direct Examination

By Mr. Saunders:

Q. Will you state your full name.

A. Takeshi Yokono.

Q. Mr. Yokono, were you connected with the Waipahu Auto Exchange, Limited, during its corporate existence? A. Yes.

Q. When was it incorporated?

A. Latter part of November.

Q. Of what year? A. 1948.

Q. 1948? A. Yes.

Q. And when was it dissolved?

A. End of December, 1949.

Q. Was that a Hawaiian corporation?

A. Yes.

Q. Were you one of its incorporators?

A. Yes.

Q. I show you what purports to be the by-laws of the corporation, of that corporation, executed by the incorporators, [42] and ask you if you have seen it before. A. Yes.

Q. I show you what purports to be your signature and ask if that is your signature.

A. Yes.

Q. Where did you sign this document?

(Testimony of Takeshi Yokono.)

A. At our shop office.

Q. At your shop office. Where is that located?

A. Waipahu, junction of Farrington Highway and Depot Road.

Q. Who esle was present at the signing of this document?

A. Anthony Yee, Shintaku, and Pang.

Q. When you say 'Shintaku and Pang,' whom do you have reference to? What are their full names?

A. Kay Pang and Fred Shintaku.

Q. Can you identify the other signatures appearing on this document?

A. Yes.

Q. Whose signatures are they?

A. This is Anthony Yee's signature. This is Fred Shintaku's signature, and this is Kay Pang's signature, and this is my signature.

Mr. Saunders: Indicating the four signatures at the foot of the document.

Q. (By Mr. Saunders): Was this executed before or after incorporation?

Mr. Cades: If your Honor please, I think that this is not the best evidence. We didn't object because we thought it would save time, and we know your Honor is in a hurry. If there is any question about these being the by-laws, or the propriety of them, the best evidence is to bring in corporate record and not oral testimony. We object on the ground this calls for a conclusion as to the date of incorporation, and the best evidence for that is the proof of incorporation by the official records.

(Testimony of Takeshi Yokono.)

Mr. Saunders: We will show by the testimony of the witness that this is the official record of the corporation.

Mr. Cades: May I have the question. The reporter will read the question. Your Honor will see the propriety of the objection.

(Question read.)

Mr. Cades: Proof of the date of incorporation is not anything for this witness to testify about.

Mr. Saunders: He has already testified, if your Honor please, and it is in the record without objection.

Mr. Cades: It was in the latter part of November. Do you want your case to stand or fall on whether that statement is true or not? That is only a general statement [44] and inaccurate. The best evidence ought to be adduced. I didn't, by not raising an objection, agree that I wouldn't insist on the best evidence forever.

Q. (By Mr. Saunders): On what day did you sign that document, Mr. Yokono?

A. I don't know the exact date.

Q. I call your attention to the date, 23rd day of November, A.D. 1948, just above your signatures.

A. Yes.

Q. Is that the date it was signed? A. Yes.

Q. Were there any other by-laws adopted for Waipahu Auto Exchange? A. I do not recall.

Q. Do you think there were any?

A. There might have been, I don't know.

(Testimony of Takeshi Yokono.)

Q. Were these the by-laws under which the corporation acted? A. Yes.

Q. This is the original that was signed by all the parties? A. Yes.

Mr. Saunders: If your Honor please, I offer this in evidence as Plaintiff's Exhibit C, being the by-laws of Waipahu Auto Exchange, Limited. [45]

Mr. Cades: May I examine the witness about this document, your Honor?

Mr. Saunders: May we have a ruling?

The Court: Well, he wants to examine him first.

Voir Dire Examination

By Mr. Cades:

Q. Yokono, as a matter of fact, wasn't Herbert Lee, an attorney in Honolulu, one of your incorporators? A. I didn't get the question.

Q. Do you know what an incorporator is, of a corporation? A. I don't know.

Mr. Saunders: Would you ask the witness to speak up?

The Court: Well, you answered that you were one of the incorporators.

Q. (By Mr. Cades): You know you are one of the incorporators, don't you? A. Yes.

Q. The people that start the company.

A. Yes.

Q. And sign the original papers. A. Yes.

Q. Wasn't Herbert Lee, an attorney, one of the incorporators? [46]

A. I remember his signing it, too.

Q. But on this paper which has been submitted,

(Testimony of Takeshi Yokono.)

is there any signature of Herbert Lee? A. No.

Q. No. Did you ever have a meeting of the incorporators in which any action was taken about the adoption of by-laws? A. Yes.

Q. Where was it? A. At our shop office.

Q. Who was present at the meeting?

A. Anthony Yee, Fred Shintaku, Kay Pang, and myself.

Q. The meeting was held at the office?

A. Yes.

Q. Had any notice been given of the meeting?

A. All—Yes.

Q. What? By telephone?

A. No, we used to get together all the time, so we had our meeting.

Q. Just had an informal meeting?

A. You mean for this?

Q. Yes. A. No.

Q. Well, describe the meeting. What happened at the meeting?

A. Yee called a meeting and all of us were present, [47] four of us, and he brought this by-laws and incorporation papers.

The Court: Who did?

The Witness: Yee. Anthony Yee brought the papers, and we read through all those articles and discussed several points, and we signed the paper.

Q. (By Mr. Cades): You discussed several points and signed the paper. Did anybody take any minutes of the meeting?

A. I don't think so at that time.

Q. Is there any record anywhere that such a

(Testimony of Takeshi Yokono.)

meeting was held? Does the corporation have any record of such a meeting? A. No.

Q. No, and do you want this Court—Do you understand that you were incorporated on November 23, the date on which this was signed; is that what your testimony is, that you were incorporated on that date?

A. I wouldn't know the exact date, but I see on the bottom there it says November 3.

Q. November 23.

A. Twenty-three. So I guess it must have been that date.

Q. But you haven't any personal knowledge as to when this company became incorporated, have you? [48] A. You mean the exact date?

Q. Yes. A. No, sir.

Q. You don't know. So that this paper may have been signed before incorporation or after incorporation, as far as you know? A. No, sir.

Q. And you don't know who all the incorporators were?

A. I would know, because I was in it, too.

Q. You wouldn't know? A. I know.

Q. Oh, you do know. And who are the incorporators, then?

A. Anthony Yee, Fred Shintaku, Kay Pang, Takeshi Yokono.

Q. And Mr. Lee? A. I don't know.

Q. You don't know.

Mr. Cades: If your Honor please, we object to the introduction of these as the by-laws of the cor-

(Testimony of Takeshi Yokono.)

poration on the ground that there is no proof as to when the corporation had been formed. There is no proof—in fact, there is a definite statement by this witness that he doesn't know who all the incorporators are. There is no proof of any corporate—at least no record of any corporate meeting properly called [49] or properly held at which the by-laws were adopted. In fact, all there is is a statement that four people came together on November 23 and signed a document purporting to be by-laws.

In the absence of that proof, I don't think that would stand as the by-laws of the Company.

The Court: The clerk will mark the document for identification until we consider it at a later time.

The Clerk: Plaintiff's No. 1, for identification.

(Thereupon, the document above referred to was marked Plaintiff's No. 1, for identification.)

The Court: I am sorry that I have to adjourn this hearing until tomorrow morning at 10 o'clock.

Mr. Cades: May I ask, your Honor, will we go all day tomorrow?

The Court: Yes, if necessary.

(Thereupon, at 11:40 a.m., March 15, 1950, an adjournment was taken until March 16, 1950, at 10:00 a.m.) [50]

March 16, 1950

The Clerk: Civil No. 947, Federal Services Finance Corporation vs. Bishop National Bank of Hawaii at Honolulu, for further trial.

(Testimony of Takeshi Yokono.)

Mr. Saunders: Ready for the plaintiff, your Honor.

Mr. Cades: Ready for defendant.

TAKESHI YOKONO

resumed the stand and testified further as follows:

Mr. Cades: May I say, your Honor, that you have before you the question of ruling on the admissibility of a purported set of by-laws.

I would like, before your Honor rules on that matter, to call your attention to the Territorial Statute which provides what is necessary in order to have corporation by-laws.

First of all, the Statute provides that "No person dealing with the corporation shall be charged with constructive notice of the by-laws." That provision appears, your Honor, in Section 8335 of the Revised Laws of Hawaii, 1945.

There are two ways provided in that section by which the by-laws may be adopted. One is a regular or special meeting called and held for the purpose, notice of which shall have stated that the purpose of the meeting is to consider the adoption of by-laws. That obviously was not done.

The other is: The by-laws may be adopted at the incorporation [51] by the signers of the articles of association. This man doesn't know, and there has been no proof of who were the signers of the association. On the evidence that is before your Honor there is no basis upon which this may be admitted

(Testimony of Takeshi Yokono.)

even for what it is worth. We will argue about what they are worth as a matter of law if they are the by-laws of the corporation, but there certainly has been no proof, if they are.

Mr. Saunders: If your Honor please, we are willing to by-pass for the moment the question of admitting this purported set of by-laws in evidence. If Counsel for the defendant will complete the cross-examination of Mr. Yokono, we have Mr. Herbert Lee to call to the stand.

Mr. Cades: Do you want to put Mr. Lee on?

Mr. Saunders: It is perfectly all right for you to finish your cross-examination of Mr. Yokono first.

Mr. Cades: Then as the record stands, there is an offer of this document in evidence. I take it it is now withdrawn. This was offered in evidence, your Honor.

Mr. Saunders: We will withdraw it for the moment, your Honor.

The Clerk: It was marked for identification.

Mr. Cades: But it was offered in evidence. Are you finished with your direct of this witness? I was merely cross-examining him on the offer. They have withdrawn the [52] offer.

Mr. Saunders: If your Honor please, we are through with our direct, reserving the right, however, to recall him for another purpose, depending upon whether this by-law does get into evidence.

The Court: All right.

Mr. Cades: All right.

(Testimony of Takeshi Yokono.)

Cross-Examination

By Mr. Cades:

Q. Mr. Yokono, you were treasurer of this company, weren't you? A. Yes, sir.

Q. Who was president? A. Anthony Yee.

Mr. Saunders: If your Honor please, I object to these questions as not being within the scope of the direct examination.

Mr. Cades: If your Honor please, I think we ought to get that settled once and for all. They put a witness on. He was put on to prove authority. I want to go into the question of authority.

Mr. Saunders: He was not put on to prove authority. He was put on for the limited purpose of testifying to signatures on the document purporting to be the by-laws of Waipahu Auto Exchange and for that limited purpose only. [53]

The Court: That brought in the question of authenticity of the by-laws, didn't it?

Mr. Saunders: If your Honor please, "Under the American rule," as stated in 58 American Jurisprudence, under Witnesses, 637, "a witness called merely to identify letters, statements, or other instruments, may not be cross-examined regarding other matters in issue in the cause."

When we put in these by-laws, if they are admissible, we are going to let the by-laws stand, and we are not binding ourselves in any way by the testimony of this witness. He was not our witness for anything other than the purpose of identifying the signature on the purported by-laws.

(Testimony of Takeshi Yokono.)

The Court: All right, the witness is excused.

Mr. Saunders: I didn't hear your Honor's ruling.

The Court: I say, with that understanding, the witness is excused. I thought that was all you wanted to ask him about. You may call him again at any time.

Mr. Cades: Well, if your Honor please, I didn't quite understand that ruling. On direct examination he testified that he was connected with this Waipahu Auto Exchange. He testified about the incorporation and he testified concerning a meeting that was held at their office in connection with the by-laws.

The Court: Yes.

Mr. Cades: Now, I think that no matter how limited the scope of cross-examination may be, I certainly [54] have a right to probe as to everything he touched on on his direct examination. That is the universal law and it is certainly the rule of the Federal court. I understand that the burden of the plaintiff's case is an extremely technical one, to show that technically the bank has got to pay some money over. This is a technicality that I don't think will hold. The witness has been put on. My questions are going to be limited to matters he referred to in direct examination.

The Court: Very well. The ruling heretofore made, then, is set aside and you may go ahead.

(Testimony of Takeshi Yokono.)

Cross-Examination

(Continued)

By Mr. Cades:

Q. Mr. Yokono, you said you were the treasurer of the Company; is that right?

Mr. Saunders: I object, your Honor; he is assuming a fact not in evidence. Mr. Yokono has not testified he was treasurer.

Mr. Cades: I will withdraw it.

Q. (By Mr. Cades): Mr. Yokono, were you treasurer of the Company?

Mr. Saunders: If your Honor please, I object to the question as not being within the scope of the direct examination.

The Court: Overruled.

A. Yes, sir. [55]

Q. (By Mr. Cades): From the beginning of the Company until its dissolution? A. Yes, sir.

Q. Who was president of the Company during that time? A. Anthony Yee.

Q. Is Anthony Yee the same Anthony Yee that is purported to have signed the by-laws, which is Exhibit 1, for identification? Is it?

The Clerk: That's right.

Q. Exhibit 1, for identification. A. Yes.

Q. That is the same Anthony Yee? A. Yes.

Q. And that same Anthony Yee was also general manager of the Company, wasn't he?

Mr. Saunders: If your Honor please, I object to this entire line of questioning as not being within the scope of the direct examination.

(Testimony of Takeshi Yokono.)

The Court: Overruled.

A. He wasn't the general manager.

Q. (By Mr. Cades): You say he was not managing the Company? A. No.

Q. Didn't he manage the Company in fact?

A. No, we had Shintaku as general manager.

Q. Mr. Yee was the president of the Company?

A. Yes.

Q. But was not the manager? A. No.

Q. Well, when you say "no," do you mean that he was not, that he didn't in fact act as manager of the Company?

A. No. Shintaku was manager there, the way I understood.

Q. That is what you understand?

A. We all understood that Shintaku was general manager there.

Q. Didn't Mr. Yee attend to all the financing of the Company? Wasn't that his responsibility?

A. No, I financed it mostly.

Q. You financed mostly? A. Yes.

Q. Did you ever have any dealings with any finance company? A. No.

Q. Did Mr. Yee have any dealings with finance companies? A. Yes.

Q. Mr. Yee was not treasurer?

A. With my sanction he financed.

Q. With your sanction? A. Yes. [57]

Mr. Saunders: If your Honor please, I think it is obvious by now to the Court that this is getting

(Testimony of Takeshi Yokono.)

very far afield from the subject of (1) the execution of a document purporting to be by-laws, and (2) a discussion, or at least a reference to a meeting in which the by-laws were signed. Now, that was the limits of Mr. Yokono's direct examination, and Counsel is now going very far afield in trying to prove authority by this witness when his direct examination did not encompass authority.

The Court: Overruled.

Q. (By Mr. Cades): Mr. Yokono, referring to that meeting that was held in the office, did Mr. Yee preside at the meeting? A. Yes.

Q. He was the presiding officer? A. Yes.

Q. Did he preside at all meetings that were held of the directors of the company? A. Yes.

Q. At that meeting did they adopt any resolution authorizing any particular officer to make arrangements with finance companies?

A. What is the question?

Mr. Cades: Read the question.

(Question read.) [58]

Mr. Cades: This is the meeting in November I am referring to.

The Witness: Oh.

A. I don't remember.

Q. (By Mr. Cades): There are no minutes or records, you say, of what was carried on at that meeting? A. No, sir.

Q. Do you have any knowledge of any resolution, any written resolution, that was ever adopted by the

(Testimony of Takeshi Yokono.)

Company relating to dealings by the Company with finance companies?

Mr. Cades: I will withdraw that if you are confused.

Q. (By Mr. Cades): You know that this Company dealt with the Federal Services Finance Corporation, don't you? A. Yes.

Q. Did the Company ever adopt a resolution relating to that business? A. You mean written?

Q. Any kind of a resolution. Is there any record of any resolution?

A. I don't remember anything like that.

Q. You don't have any knowledge of any resolution? A. No written resolution.

Q. Did you ever see a letter that was written on behalf of Waipahu Auto Exchange to the Federal Services Finance [59] providing an arrangement under which conditional sale contracts could be sold to that company?

Mr. Saunders: If your Honor please, for the record may I make clear that our objection goes to this entire line of testimony as being not within the scope of the direct examination. If Counsel for the defense wants to go into all these matters, I think it is only fair he make this witness his witness and refrain from leading questions, which certainly are not in order on direct examination, which this actually is.

The Court: The record shows your objection.

Mr. Cades: Will you read the question.

(Testimony of Takeshi Yokono.)

(Question read.)

A. As far as I recall I haven't seen it.

Q. (By Mr. Cades): You haven't seen such a letter. Then you had no personal knowledge of the arrangements that existed with respect to the sale of conditional sale contracts to this finance company?

A. No.

Q. No. You have no knowledge of them?

A. Excepting from what we understood from Yee.

Q. And you depended on Yee for the making of arrangements and the carrying out of arrangements?

Mr. Saunders: May we have that clarified, your Honor. What arrangements? [60]

Mr. Cades: He understands the question, I think.
The Witness: No.

Mr. Cades: Would you read him the question again.

(Question read.)

Q. (Continuing): With the finance company?

A. Yes.

The Court: What was the answer?

(Answer read.)

Q. (By Mr. Cades): Mr. Yokono, did you ever see a letter written to the Waipahu Auto Exchange by the Federal Services Finance and approved by the Waipahu Auto Exchange relating to arrange-

(Testimony of Takeshi Yokono.)

ments for the financing of conditional sale contracts?

A. No.

Mr. Saunders: If your Honor please, we feel that the law applicable to this situation is——

The Court: Say that last over again.

Mr. Saunders: We feel that the law applicable to the situation is that the scope of cross-examination of this witness should have been limited to matters relating to the execution of the document purporting to be the by-laws, and with that understanding we suggested that that complete the cross-examination of this witness. We have under subpoena Mr. Herbert Lee, attorney-at-law, an officer of this court. We don't want to delay him unnecessarily and he is due in [61] another court at 10:30 this morning. With your Honor's permission we would like to ask the witness Yokono be excused and Mr. Herbert Lee put on at this time.

Mr. Cades: We offered to put him on out of turn and they refused it. We accept the offer again to put Mr. Lee on out of turn, by all means.

(Witness temporarily excused.)

HERBERT K. H. LEE

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Sit down.

Mr. Saunders: If your Honor please, with the consent of Counsel for the defense, we offer in

(Testimony of Herbert K. H. Lee.)

evidence a certified copy of the Articles of Incorporation and Affidavit of officers of Waipahu Auto Exchange, Limited, and ask that it be marked Plaintiff's Exhibit C.

Mr. Cades: Would you mind identifying it as to date for my record. I have no objection.

Mr. Saunders: There are two stamps. Treasurer's Office Rec'd 1948, Nov. 27, 10:31 a.m.; secondly, there is another stamp: Rec'd 1948 Dec. 7, 11:51 a.m.

The Clerk: Plaintiff's Exhibit C.

Mr. Saunders: didn't get your Honor's ruling. Was that received in evidence?

The Court: Yes. [62]

(Thereupon, the document above referred to was received in evidence as Plaintiff's Exhibit C.)

PLAINTIFF'S EXHIBIT C

Territory of Hawaii

Treasury Department

Honolulu

It is hereby certified that the attached is a true and exact copy of: Articles of Incorporation and Affidavit of Officers of Waipahu Auto Exchange, Limited, filed and recorded in this office on December 7, 1948.

In witness whereof, I have hereunto set my hand and affixed the seal of the Treasury Department,

(Testimony of Herbert K. H. Lee.)

Plaintiff's Exhibit C—(Continued)

Territory of Hawaii, this 14th day of March, 1950.

[Seal] /s/ WILLIAM B. BROWN,
 Treasurer, Territory of Ha-
 waii.

In the Matter of the Incorporation of
WAIPAHA AUTO EXCHANGE, LIMITED.

Articles of Incorporation
and Affidavit

(Treasurer's Office Rec'd 1948, Nov. 27, 10:31
a.m., Territory of Hawaii.)

(Treasurer's Office Rec'd 1948, Dec, 7, 11:51
a.m., Territory of Hawaii.)

HERBERT K. H. LEE,
304 Hawaiian Trust Bldg.,
Honolulu 48, Hawaii,
Attorney for Incorporators.

(Copy)

In the Matter of the Incorporation of
WAIPAHA AUTO EXCHANGE, LIMITED.

Articles of Incorporation

Know All Men by These Presents:

That the undersigned, being all natural persons of
full age, and residents of and in the City and County
of Honolulu, Territory of Hawaii, do hereby asso-
ciate themselves together for the purpose of forming
a corporation under the laws of the Territory of

(Testimony of Herbert K. H. Lee.)

Plaintiff's Exhibit C—(Continued)

Hawaii, and do hereby adopt the following Articles of Incorporation, the provisions whereof shall be binding upon the parties hereto and their associates, successors and assigns.

I.

The name of the corporation is and shall be Waipahu Auto Exchange, Limited.

II.

The principal office of said corporation is and shall be in Waipahu, City and County of Honolulu, Territory of Hawaii, but branch offices may be established by said corporation in any portion or portions of said Territory within or without said city and county and in any state, territory or possession of the United States of America and in any foreign country.

* * *

VII.

The following persons shall comprise the Board of Directors of the corporation, and they shall hold office (subject to the provisions of these Articles) henceforth until the annual meeting of the corporation to be held in 1949, and thereafter until their successors are elected or appointed: Anthony Yee, Fred H. Shintaku, Kay Y. K. Pang, Takeshi Yokono, Herbert K. H. Lee.

(Testimony of Herbert K. H. Lee.)

Plaintiff's Exhibit C—(Continued)

VIII.

The following persons shall hold offices set opposite their respective names (subject to the provisions of these Articles) henceforth until the annual meeting of the corporation to be held in 1949, and thereafter until their successors are elected or appointed:

Anthony Yee	President
Fred H. Shintaku.....	Vice-President
Kay Y. K. Pang.....	Secretary
Takeshi Yokono	Treasurer

IX.

These Articles of Incorporation may be amended at any time by vote of at least three-fourths ($\frac{3}{4}$) of all the issued and outstanding stock of the corporation at a meeting duly called for the purpose of considering such question and as provided by law.

In Witness Whereof, the parties hereto have hereunto subscribed their names at Honolulu, T.H., this 23rd day of November, A.D. 1948.

/s/ ANTHONY YEE,

/s/ FRED H. SHINTAKU,

/s/ KAY Y. K. PANG,

/s/ TAKESHI YOKONO,

/s/ HERBERT K. H. LEE.

(Testimony of Herbert K. H. Lee.)

Plaintiff's Exhibit C—(Continued)

Territory of Hawaii,

City and County of Honolulu—ss.

On this 23rd day of November, A.D. 1948, before me personally appeared Anthony Yee, Fred H. Shintaku, Kay Y. K. Pang and Takeshi Yokono, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

[Seal] /s/ JANET S. YOSHIDA,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My Commission Expires Jan. 22, 1951.

Territory of Hawaii,

City and County of Honolulu—ss.

On this 1st day of December, A.D. 1948, before me personally appeared Herbert K. H. Lee, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

[Seal] /s/ FLORENCE Y. OKUBO,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My Commission Expires August 9, 1951.

Territory of Hawaii,

City and County of Honolulu—ss.

Anthony Yee, Kay Y. K. Pang and Takeshi Yo-

(Testimony of Herbert K. H. Lee.)

Plaintiff's Exhibit C—(Continued)

kono, being first duly sworn on oath, each for himself and not one for the other, depose and say:

I.

That affiants are officers of the corporation asking to be incorporated under the laws of the Territory of Hawaii under the name Waipahu Auto Exchange, Limited, to-wit, the said Anthony Yee is President, Kay Y. K. Pang is the Secretary and Takeshi Yokono is the Treasurer.

II.

That the capital stock of said company is Ten Thousand Dollars (\$10,000.00) divided into One Thousand (1,000) shares of the par value of Ten Dollars (\$10.00) each with the privilege of increasing said capital stock to the sum of One Hundred Thousand Dollars (\$100,000.00).

III.

That more than seventy-five per cent (75%) of said capital stock has been subscribed and paid for as follows:

	Subscribed	Paid in Cash
Anthony Yee.....	200 shares	\$ 500.00
Fred H. Shintaku.....	200 shares	500.00
Kay Y. K. Pang.....	200 shares	500.00
Takeshi Yokono.....	200 shares	500.00
	<hr/>	<hr/>
	800 shares	\$2,000.00

(Testimony of Herbert K. H. Lee.)

Plaintiff's Exhibit C—(Continued)

That the subscription price of said capital stock is Ten Dollars (\$10.00) a share.

That each of the above mentioned persons have paid in cash unto the Treasurer of the corporation at least ten per cent (10%) of the amount of their respective subscription.

That there has been paid unto the Treasurer of the corporation on said capital stock subscribed afore-said the sum of Two Thousand Dollars (\$2,000.00) in cash, being more than ten per cent (10%) of the said capital stock of said company.

/s/ ANTHONY YEE,

/s/ KAY Y. K. PANG,

/s/ TAKESHI YOKONO.

Subscribed and sworn to before me this 23rd day of November, 1948.

[Seal] /s/ JANET S. YOSHIDA,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My Commission Expires January 22, 1951.

Admitted March 16, 1950.

Direct Examination

By Mr. Saunders:

Q. Mr. Lee, what is your occupation?

A. Attorney-at-law.

Q. Did you represent the Waipahu Auto Ex-

(Testimony of Herbert K. H. Lee.)

change, Limited, during its period of incorporation?

A. I drew up the Articles of Incorporation and the By-Laws, yes.

Q. Now, you then represented the incorporators of the corporation as well; is that correct?

A. That's correct.

Q. And you say you drew up the by-laws?

A. That's right.

Q. After you had completed the by-laws and articles, what did you do with them?

A. Well, if I recall, following the usual procedure, it was submitted to the treasurer—the articles were submitted to the treasurer for filing.

Q. Prior to that, Mr. Lee, did you give them to any particular persons to have executed?

A. Yes, I remember that it was Mr. Yee, Anthony Yee, who was the—well, the prime mover in this organization. He was the first one person who consulted me about the [63] organizing a corporation called the Waipahu Auto Exchange.

Q. So that when you completed the preparation of the by-laws and articles, what did you do with them?

A. I turned it over to Mr. Yee.

Q. And then were they returned to you signed?

A. Well, I believe so, yes.

Q. And then you filed the articles; is that correct?

A. That's correct.

Q. And did you file them on November 27, 1948?

A. I will have to look at the record. I wouldn't be able to recall. Well, the date that it was filed, as

(Testimony of Herbert K. H. Lee.)

certified by the treasurer, would be the approximate date as far as my own recollection is concerned.

The Court: Well, is your memory to the effect that you personally took them to the treasurer's office and filed them?

The Witness: No, I believe it was my secretary who filed them.

Q. (By Mr. Saunders): You gave them to your secretary to file them? A. That's right.

Q. On or about November 27?

A. That's right.

The Court: Yee returned them to you?

The Witness: I don't recall, your Honor. [64]

Q. (By Mr. Saunders): They were returned to you, though, through your agent?

A. Oh, yes. You mean for filing purposes? I thought your Honor meant after it was filed.

The Court: I meant for filing.

Q. (By Mr. Saunders): Anthony Yee returned the articles to you?

A. I believe so. It has been so long. It is the usual procedure that where people who come to me as clients, for me to draft the papers for incorporation, return the same to me for filing.

Q. You prepared the by-laws and the articles for only four signatures; is that correct?

A. Yes, I believe so.

Q. So that at the time you submitted the by-laws and the articles to Mr. Yee to have executed, there were only four spaces for signatures on each document? A. I believe so.

(Testimony of Herbert K. H. Lee.)

Q. And the articles of association, after having been filed with the treasurer's office, were returned to you; is that correct?

A. Yes, because I had overlooked the fact that under our statutory laws there would have to be five incorporators before filing.

Q. So what did you do to cure the oversight?

A. Well, they asked me to be a dummy director just for the purpose of compliance with the statute.

Q. And were you also asked to be a dummy incorporator? A. Yes.

Q. Now, during this procedure of incorporation prior to filing the articles of incorporation, did you approve the by-laws?

A. Did I personally approve the by-laws? I drew up the by-laws.

Q. So that you did approve them and in fact even drew them up?

A. When you say the word 'approved,' by implication, yes, I approved it, yes.

Q. I show you Plaintiff's No. 1, for identification, and ask if you have ever seen this document before.

PLAINTIFF'S EXHIBIT No. 1

Waipahu Auto Exchange, Limited

By-Laws

* * *

(Testimony of Herbert K. H. Lee.)

Plaintiff's Exhibit No. 1—(Continued)

Article III.

Board of Directors

* * *

Section 3. Chairman, Meetings, Notice. The Board may appoint a Chairman who shall preside at all meetings and serve during the pleasure of the Board. The Board shall hold meetings as often as the business of the corporation may require at the call of the President, the Chairman of the Board, or any two directors. The Secretary shall give notice of each meeting of the Board of Directors either orally or in writing by mailing or delivering the same not less than one (1) day before the meeting unless otherwise prescribed by the Board. The failure by the Secretary to give such notice or by any director to receive such notice shall not invalidate the proceedings of any meeting at which a quorum of directors is present. The directors elected at the annual stockholders' meeting of the corporation shall, without any notice being given, hold a meeting as soon as may be after the meeting of the stockholders at which they are elected.

Section 4. Quorum and Adjournment. The majority of the directors shall constitute a quorum for the transaction of business and no action taken, other than the appointment of directors to fill temporary vacancies, as provided in these by-laws, shall bind the corporation unless it shall receive the concurring

(Testimony of Herbert K. H. Lee.)

Plaintiff's Exhibit No. 1—(Continued)

vote of a majority of all the directors. In the absence of a quorum, the presiding officer or a majority of the directors present may adjourn the meeting from time to time without further notice until a quorum be had.

Section 5. Powers of Board of Directors. The property, affairs and business of the corporation shall be managed by the Board of Directors and, except as otherwise provided by law or these by-laws, all the powers and authority of the corporation shall be vested in and may be exercised by the Board of Directors as fully and for all purposes as though exercised directly by the stockholders; and in furtherance and not in limitation of said general powers, the Board of Directors shall have power: To acquire and dispose of property; to appoint a general manager and such other managers, officers or agents of the corporation as in its judgment this business may require, and to confer upon and to delegate to them by power of attorney or otherwise such power and authority as it shall determine; to fix the salaries or compensation or any or all of the officers, agents and employees of the corporation, and in its discretion require security of any of them for the faithful performance of any of their duties; to declare dividends in accordance with law when it shall deem it expedient; to make rules and regulations not inconsistent with law or the by-laws for the transaction of business; to instruct the officers or agents of the corporation with respect to, and to

(Testimony of Herbert K. H. Lee.)

Plaintiff's Exhibit No. 1—(Continued)

authorize the voting of, stock of other corporations owned or held by this corporation; to incur such indebtedness as may be deemed necessary, which indebtedness may exceed the amount of the corporation's capital stock; to create such committees (including an executive committee or committees) and to designate as members of such committees such persons as it shall determine, and to confer upon such committees such powers and authorities as may by resolution be set forth for the purpose of carrying on or exercising any of the powers of the corporation; to create and set aside reserve funds for any purpose and to invest any funds of the corporation in such securities or other property as to it may seem proper; to remove or suspend any officer and generally to do any and every lawful act necessary or proper to carry into effect the powers, purposes and objects of the corporation.

Section 6. Vacancies and Substitute Directors. If any permanent vacancy shall occur in the Board of Directors through death, resignation, removal or other cause, the remaining directors, by affirmative vote of a majority of the whole Board, may elect a successor director to hold office for the unexpired portion of the term of the director whose place shall be vacant.

In case of a temporary vacancy, due to the absence of any director from Waipahu or the sickness or disability of any director, the remaining directors, whether constituting a majority or a minority

(Testimony of Herbert K. H. Lee.)

Plaintiff's Exhibit No. 1—(Continued)

of the whole Board, may appoint some person as a substitute director who shall be a director during such absence or disability and until such director returns to duty. The determination by the Board of Directors as shown on the minutes of the fact of such absence or disability and the duration thereof shall be conclusive as to all persons and the corporation.

Section 7. Approval of Acts of Board of Directors. At any annual or special meeting of the stockholders any or all of the acts and doings of the Board of Directors may be ratified, confirmed and approved by the stockholders and such ratification and approval shall be as valid and as binding upon the corporation and upon all the stockholders as though it had been approved or ratified by every stockholder of the corporation.

No contract, agreement, undertaking or other transaction between this corporation and any other corporation shall be affected by the fact that some or all of the directors of this corporation are interested in or are directors or officers of such other corporation.

Article IV.

Officers

Section 1. Appointment. The officers of the corporation shall be the President, Vice-President, Secretary and Treasurer, and in addition thereto, in the discretion of the Board of Directors, a Chairman of

(Testimony of Herbert K. H. Lee.)

Plaintiff's Exhibit No. 1—(Continued)

the Board, an Assistant Treasurer or Assistant Treasurers, and an Assistant Secretary or Assistant Secretaries, and such other officers with such duties as the Board of Directors shall from time to time determine. All officers shall be appointed annually by the Board of Directors and shall serve until their successors shall have been appointed. One person may hold more than one office and all officers shall be subject to removal at any time by the affirmative vote of the majority of the whole Board. The Board of Directors may, in its discretion, appoint acting or temporary officers and may appoint officers to fill vacancies occurring for any reason whatsoever, and may in its discretion limit or enlarge the duties and powers of any officer appointed by it.

Section 2. Chairman of the Board. The Chairman of the Board, if appointed, shall preside at all meetings of the Board of Directors and shall perform such other duties as may be required of him by the Board of Directors.

Section 3. The President. The President shall preside at all meetings of stockholders; and in case no Chairman of the Board of Directors is appointed, or in the absence of such a Chairman, if appointed, he shall preside at meetings of the Board of Directors. He shall exercise general supervision over the business of the corporation and over its several officers, agents and employees, subject, however, to the control of the Board of Directors.

(Testimony of Herbert K. H. Lee.)

Plaintiff's Exhibit No. 1—(Continued)

Section 4. The Vice-President. The Vice-President or Vice-Presidents shall, in the order of priority of appointment, perform all the duties and exercise all the powers and rights of the President provided by these by-laws or otherwise during the absence or disability of the President, or whenever the office is vacant, and shall perform all other duties assigned by the Board of Directors.

Section 5. The Treasurer. The Treasurer shall have custody of all the funds, notes, bonds and other evidences of property of the corporation, and shall be responsible for keeping all the books and accounts of the corporation, and shall render statements thereof in such form and as often as required by the Board of Directors. He shall be responsible for the keeping of the stock books, stock transfer books, and stock ledger of the corporation. The Treasurer shall perform all other duties assigned to him by the President or the Board of Directors.

Section 6. The Secretary. The Secretary shall keep the minutes of all meetings of the Board of Directors and the minutes of all meetings of the stockholders. He shall give notice in conformity with these by-laws of all meetings of the stockholders and the Board of Directors. In the absence of the President and the Vice-President he shall call all meetings of the stockholders to order and shall preside until a chairman pro tempore is chosen. He shall also perform all other duties assigned him by the Board of Directors or the President.

(Testimony of Herbert K. H. Lee.)

Plaintiff's Exhibit No. 1—(Continued)

Article V.

Execution of Instruments

Section 1. Proper Officers. Except as otherwise provided by these by-laws or by law, all checks, drafts, notes, bonds, acceptances, deeds, leases, contracts, and all other documents and instruments, shall be signed, executed and delivered by the President or a Vice-President and by the Treasurer or the Secretary; provided, however, that the Board of Directors may from time to time by resolution authorize checks, drafts, bills of exchange, notes, orders for the payment of money, licenses, endorsements, stock powers, powers of attorney; proxies, waivers, consents, returns, reports, applications, notices, agreements or documents, instruments or writings of any nature to be signed, executed and delivered by such officers, agents or employees of the corporation, or any one of them, in such manner as may be determined by the Board of Directors.

Article VI.

Voting of Stock by the Corporation

Section 1. In all cases where the corporation owns, holds or represents, under power of attorney or proxy or in any representative capacity, shares of the capital stock of any corporation, or shares or interests in business trusts, co-partnerships, or other associations, such shares or interests shall be represented and voted by the President or, in the absence

(Testimony of Herbert K. H. Lee.)

Plaintiff's Exhibit No. 1—(Continued)

of the President, by a Vice-President; or in the absence of the Treasurer, by the Secretary; provided, however, that in the absence of any such officer then any person specifically appointed by the Board of Directors for the purpose shall have the right if present to represent and vote such shares or interests.

Article VII.

Capital Stock

Section 1. Certificates of Stock. The certificates of stock of each class shall be in such form and of such device as the Board of Directors shall from time to time determine. They shall be signed by the President or a Vice-President and by the Treasurer or the Secretary, and shall bear the corporate seal. Certificates shall not be issued for fractional shares. In the event that fractional interests shall result in any manner as a result of any action by the stockholders or directors of the corporation, the Treasurer may sell the aggregate of such fractional interests under such reasonable terms and conditions as the Treasurer shall determine, subject, however, to the control of the Board of Directors, and distribute the proceeds thereof to the persons entitled thereto.

Section 2. Transfer of Stock. Transfer of stock may be made in any manner permitted by law, but no transfer shall be valid except between the parties thereto until a new certificate shall have been ob-

(Testimony of Herbert K. H. Lee.)

Plaintiff's Exhibit No. 1—(Continued)

tained and the transfer shall have been duly recorded in the stock books of the corporation.

No certificate for stock shall be delivered unless the person entitled to such certificate, or some person duly authorized by him, shall receipt for the same and agree to be bound by all of the provisions of the by-laws applicable to such shares.

Section 3. Closing of Transfer Books. The Board of Directors shall have power for any corporate purpose to close from time to time the stock transfer books of the corporation for a period not exceeding twenty-five (25) consecutive days; provided, however, that in lieu of closing the stock transfer books as aforesaid, the Board of Directors may fix in advance a record date for the payment of any dividend, or for the allotment of rights, or for the effective date of any change, conversion or exchange of capital stock, or in connection with obtaining the consent of stockholders in any matter requiring their consent, or for the determination of the stockholders entitled to notice of and to vote at any meeting; and in such case only such stockholders as shall be stockholders of record on the record date so fixed shall be entitled to the rights, benefits and privileges incident to ownership of the shares of stock for which said record date has been fixed, notwithstanding any transfer of any stock on the books of the corporation after any such record date.

Section 4. Lost Certificates. The Board of Direc-

(Testimony of Herbert K. H. Lee.)

Plaintiff's Exhibit No. 1—(Continued)

tors may, subject to such rules and regulations as may be adopted by it from time to time, in its discretion, order a new certificate or certificates of stock to be issued in the place of any certificate or certificates of the corporation alleged to have been lost or destroyed, but in every such case the owner of the lost certificate or certificates shall be required to file sworn evidence showing the facts connected with such loss, and shall be required to give to the corporation a bond or undertaking in such sum not less than twice the par value, if any, or not less than twice the amount of the market value, of such lost or destroyed certificate or certificates of stock as the Board of Directors may direct as indemnity against loss, damage or liability that the corporation may incur by reason of such issuance of a new certificate or certificates.

The Board of Directors may, in its sole discretion, refuse to replace any lost certificate save upon the order of the court having jurisdiction in the manner.

Article VIII.

Voting Trust Agreements

In the event that the trustee or trustees of any voting trust agreement affecting the stock of the corporation shall file with the Secretary of the corporation an executed counterpart of any such voting trust agreement, the corporation and all directors and officers thereof shall be required to recognize and give effect to the powers of the trustee or trustees thereunder.

(Testimony of Herbert K. H. Lee.)

Plaintiff's Exhibit No. 1—(Continued)

Article IX.

Amendment

These by-laws may be altered, amended or repealed from time to time by a vote of not less than the majority of all the stock of the corporation issued and outstanding and entitled to vote at any annual meeting or at any special meeting called for such purpose.

The undersigned, Anthony Yee, Fred H. Shintaku, Kay Y. K. Pang and Takeshi Yokono, being the incorporators of Waipahu Auto Exchange, Limited, at the incorporation of the same at Honolulu, Territory of Hawaii, have adopted the foregoing as the by-laws of the corporation this 23rd day of November, A.D. 1948.

/s/ ANTHONY YEE,

/s/ FRED H. SHINTAKU,

/s/ KAY Y. K. PANG,

/s/ TAKESHI YOKONO.

Marked for identification March 15, 1950.

A. Oh yes, this was in my file before you asked me for it.

Q. During the life of the corporation you maintained this document in your file?

A. I believe so, because it was in my file all the time and was never released to anyone. This was the original.

(Testimony of Herbert K. H. Lee.)

Q. That was the original? A. Yes.

Q. Of the purported by-laws? A. Yes. [66]

Q. Do you recognize the signatures thereon?

A. Well, I recognize Anthony Yee's signature. I recognize Fred Shintaku's signature, and Yokono. I don't recognize Kay Y. K. Pang.

Q. From the time that the articles of association and the document there were returned to you, at all times that particular document, Plaintiff's Exhibit 1, was in your possession; is that correct?

A. That's correct.

Q. And you knew of the existence and the contents thereof? A. Oh, yes.

Q. Did you believe that those were the by-laws of the corporation?

A. There is no doubt——

Mr. Cades: I object to that——

A. (Continuing——about it in my mind.

Mr. Cades (Continuing): As to whether he believed they were or not. It is a matter your Honor is to rule on.

Mr. Saunders: If your Honor please, I ask that for the purpose of showing that at all times Mr. Lee, one of the incorporators, approved of and believed and acted as though these were the by-laws. Now, whether or not they were the by-laws is for your Honor to determine, but whether or not this incorporator adopted and approved and believed [67] these by-laws is another matter.

Mr. Cades: That still becomes a matter of law,

(Testimony of Herbert K. H. Lee.)

your Honor. Under our statute the only occasion on which he could be asked for belief would be an expert, and my understanding of the law is that your Honor will be the expert on what the law is.

The Court: Well, the situation is that he answered the question. Do you want it stricken?

Mr. Cades: I didn't hear the answer. May I hear the answer, Miss Reporter.

(Answer read.)

Mr. Cades: I move that the answer be stricken from the record.

Mr. Saunders: If your Honor please, the purpose of my asking the question is to show—and I will cite law to that effect—that where there has been substantial compliance with the statute that is all there is required. We have already shown that four of the incorporators approved and adopted the by-laws during the procedure prior to incorporation and that Mr. Lee, if you will pardon the term, a dummy incorporator, made up the by-laws, acted throughout the life of the corporation as if they were the by-laws, and himself believed they were the by-laws. We submit that is part of our showing that there has been a substantial compliance with the statute. [68]

Let me quote the section of the statute we are relying on, Section 8335, Revised Laws of Hawaii; 1945: “. . . provided, however, that by-laws may be adopted at the incorporation of a corporation by the signers of the articles of association.”

There were five signers, as is indicated in that

(Testimony of Herbert K. H. Lee.)

document, Anthony Yee, Fred Shintaku, Takeshi Yokono, and Kay Pang, and the dummy incorporator, Mr. Herbert Lee, who signed only for the purpose of satisfying the statute of Hawaii, which requires five signatures.

The Court: Yes, well, you are talking about the articles of association now?

Mr. Saunder: Beg pardon?

The Court: You are now talking about the articles of association?

Mr. Saunders: The articles of association show there were five incorporators.

The Court: Yes.

Mr. Saunders: The statute relating to by-laws provides that the by-laws may be adopted at the incorporation of a corporation by the signers of the articles of association. I made reference to Plaintiff's Exhibit C to show who the signers of the articles of association were. I point out that in the adoption of the by-laws that Mr. Herbert Lee is the only one who didn't sign, but that he actually approved of them and acted throughout the life of the corporation as if they [69] were the by-laws. We submit that that of itself will make a showing that there was substantial compliance with the statute and that in truth these were the by-laws.

The Court: Are you through?

Mr. Saunders: Beg pardon?

The Court: Are you through?

Mr. Saunders: Yes, your Honor.

Mr. Cades: If your Honor please, I think Mr.

(Testimony of Herbert K. H. Lee.)

Saunders doesn't have in mind what is before your Honor for ruling. I have objected to a question asked of this witness as to whether he believed they were the by-laws. If your Honor please, the question of whether he believed or not is not one of the operative facts that are going to determine whether there were any by-laws adopted or not, and my reason for saying that is that a corporation is required, where there are statutes saying what shall be done, either the corporation complies with the statute or they haven't any by-laws. The statute clearly provides it has to be at a meeting that is called for the purpose. That was not done. Or it has to be at incorporation. At incorporation would be either the date of the first filing, which was rejected by the treasurer, or the second filing, which was permitted by the treasurer. There is no evidence, and we will argue whether they are by-laws or not at a later time. I think the only thing before your Honor is really a matter of form of evidence, if [70] an attorney-at-law can be permitted to say whether he thought they were by-laws or not, and I submit that is not a proper question. That is a matter your Honor determines, not an attorney. That is the only matter before your Honor at this time.

The Court: And your motion was to strike.

Mr. Cades: My motion was to strike.

The Court: The motion is granted.

Q. (By Mr. Saunders): Mr. Lee, did you act upon this document as if it was the by-laws of the

(Testimony of Herbert K. H. Lee.)

corporation of Waipahu Auto Exchange, Limited?

A. I don't know how to answer that question, Mr. Saunders. Did I act. I stated that I drew up the by-laws, I drew up the articles, and that these by-laws were signed and executed at the time that I prepared the articles and by-laws and were returned for filing, and I, for the purpose of the statute, signed the articles of association and apparently took care of that situation first and kept the by-laws as though it were the functional by-laws of the Waipahu Auto Exchange, Limited.

Q. Were you a shareholder in this corporation?

A. No.

Mr. Saunders: If your Honor please, I make a second offer of proof of Plaintiff's Exhibit 1, for identification and ask that these be received in evidence, based upon a [71] foundation's having been laid in the testimony of Mr. Lee and Mr. Yokono.

Mr. Cades: Before ruling on that, may I cross-examine as to this document, your Honor.

Voir Dire Examination

By Mr. Cades:

Q. Mr. Lee, you didn't actually sign any set of by-laws, did you, for the corporation?

A. No, I didn't.

Q. And from what you have discovered since this matter has arisen, you believe that these by-laws were at all times in your own files; is that correct?

A. That is correct.

Q. Then you do know that the secretary of the

(Testimony of Herbert K. H. Lee.)

corporation—By the way, what is the secretary's name?

A. Well, I wouldn't be able to recall without looking at the articles.

Q. The secretary is shown as Kay Y. K. Pang. Do you happen to know who she is?

A. I don't.

Q. You have no knowledge as to whether she had a copy certified by her which was available for the examination of the stockholders?

A. What document do you refer to? The articles?

Q. The by-laws. [72]

A. The by-laws.

Q. By-laws.

A. Will you repeat that question again; I didn't understand it.

(Question read.)

A. No, I haven't had no contact with her in person. I couldn't answer that she had certified these to the stockholders.

Q. But you are not in a position to say that she had a copy? Actually, as far as you know, this is the only existent copy that was in your files; is that right?

A. I don't know whether I have another copy, Mr. Cades, but that was the copy in my file.

Q. I mean, you don't know that there were any other copies except the ones that were in your files; is that right?

A. No, I prepared several copies of the by-laws.

(Testimony of Herbert K. H. Lee.)

I don't know how many. It is usually four, four or five copies.

Q. But you don't know anything about the existence or whereabouts of other copies?

A. No, I don't.

Q. And you don't know whether any other copies were signed? A. No, I don't.

Q. I show you a receipt of December 1, 1948, from your [73] office. Will you state whether you have any personal knowledge as to the payment that was represented by that receipt.

A. Well, it speaks for itself here that my office received from Anthony Yee \$150, incorporation of Waipahu Auto Exchange, legal fee, and signed by my secretary.

Q. Do you know whether Anthony Yee brought currency to your office?

A. I couldn't say of my own knowledge because that dealing would be directly with my secretary. That is the office functional procedure on all payments of bills. But I notice it says "cash" there.

Q. Probably a cash payment. A. Yes.

Q. By Yee. A. Yes.

Mr. Cades: I offer this in evidence.

Mr. Saunders: If your Honor please, I see no foundation whatsoever for the introduction of this document in evidence. It has no bearing on the case whatsoever. I object that it is immaterial and irrelevant, and I further object it is being offered on cross-examination, which is an improper manner in which to offer an exhibit.

(Testimony of Herbert K. H. Lee.)

The Court: What is the purpose?

Mr. Cades: If your Honor please, you will recall that on direct examination there was a statement made that [74] Anthony Yee was the prime mover in this. I want your Honor to get the background and that Yee was the corporation in many, many respects. It will have some bearing, as your Honor will see, on whether these are corporate by-laws or whether they are not. I will admit, your Honor, that it doesn't throw any great light on the matter. I am trying to bring before the Court the proper background of it because ultimately you are going to have to rule on the admissibility of the by-laws.

The Court: The objection is sustained. Materiality.

Mr. Cades: May I have this document marked for identification.

The Court: Yes.

The Clerk: Defendant's A, for identification.

(Thereupon, the document above referred to was marked Defendant's A, for identification.)

Q. (By Mr. Cades): Mr. Lee, while you are on the stand, will you also identify this receipt 1979, issued to Anthony Yee for \$48.75——

Mr. Saunders: I object to this question——

Mr. Cades: Just a minute. I am just laying a foundation for identification.

Q. (Continuing): The receipt is dated January 21, 1949. That was issued by your office?

A. That's right. [75]

Testimony of Herbert K. H. Lee.)

Mr. Saunders: I object to the questions, your Honor, as being immaterial.

Mr. Cades: I haven't offered anything yet. I am asking this be marked for identification.

The Court: It may be marked for identification.

The Clerk: Defendant's B, for identification.

(Thereupon, the document above referred to was marked Defendant's B, for identification.)

Q. (By Mr. Cades): Mr. Lee, you are named in the articles of association as a director of the corporation. I think you identified yourself as a dummy director. Did you, in fact, attend any meetings of the board of directors? A. No.

Q. At no time during the life of the corporation? A. No.

Q. Were you ever notified of any meetings of the board of directors? A. No.

Q. Did you ever attend any stockholders' meetings of this corporation? A. No.

Q. You are not in a position to say whether there were any other or different by-laws that were ever adopted by the corporation?

A. Well, I know of no other by-laws. [76]

Q. You attended no meetings of directors or stockholders? A. No.

Q. Never received notice? A. No.

Q. So that if there were other by-laws of the corporation, you have no knowledge of them?

A. I have no knowledge.

Mr. Cades: I have no further questions. I object to the admissibility of these as the proposed by-

(Testimony of Herbert K. H. Lee.)

laws of the corporation on the grounds that there has been no compliance shown with the statutes of the Territory, without admitting that even if they were by-laws that it would have any bearing on the authority which will ultimately be decided. I think that the admissibility of these records would merely further clutter up the confusion as to who had authority to act.

Mr. Saunders: If your Honor please, prior to your Honor's ruling could I ask a couple of short questions.

The Court: Go ahead.

Direct Examination
(Continued)

By Mr. Saunders:

Q. Mr. Lee, where are your offices?

A. 304 Hawaiian Trust Building.

Q. And do you know where the offices are located of the Waipahu Auto Exchange, Limited; that is, where they were located at the time of the period just prior to incorporation? [77]

A. I believe they were located at Waipahu.

Q. How far from your office is Waipahu, approximately?

Mr. Cades: I think the Court knows.

A. Well, I really should know, but as to how many miles Waipahu is from my office——

Q. (By Mr. Saunders): Somewhere close to 20 miles, is it not? A. Approximately, yes.

Q. And the reason you handled them this way

(Testimony of Herbert K. H. Lee.)

was to avoid the four people's having to come to your office; is that correct? That is to say, the reason you prepared them and had them sent out to Waipahu?

A. Yes, I prepared them and Mr. Yee came for the papers and took the papers away from my office.

Q. Did you believe all of this to be a part of the procedure of incorporation, having the purported by-laws and having the articles signed in that manner? A. That is right.

Mr. Cades: I object to the form.

Mr. Saunders: I withdraw that. We have no further questions of this witness.

Mr. Cades: We submit the question, your Honor.

Mr. Saunders: Your Honor, may this witness be excused. I believe he is due in court.

The Court: Yes. [78]

(Witness excused.)

Mr. Saunders: If I may make a brief statement on the question of admissibility of this document, your Honor.

The Court: Just a minute. Now go ahead.

Mr. Saunders: If your Honor please, under our statute, Section 8335 provides that which Mr. Cades has cited, the by-laws may be adopted by meeting called for that purpose "provided, however, that by-laws may be adopted at the incorporation of a corporation by the signers of the articles of association. . ."

Now in this case we have a different set-up. We

have a period prior to incorporation, which was necessitated by the distance between the attorney's office and the place where the office of the corporation was located. We have a meeting where the by-laws were read. They were signed by four of the incorporators, and we have the fifth incorporator having prepared the by-laws, being only a dummy incorporator, not being a stockholder, signing only for the purpose of complying with the statute.

He further stated he approved the by-laws, that he acted as if they were the by-laws. We submit that that is certainly an adoption of the by-laws. There is nothing in the statute which requires that the by-laws have to be signed. It only says they have to be adopted. We submit that they were adopted by all the parties to the incorporation in compliance with the statute; and that, even if they were not, they have been acted upon at all times as if they were the by-laws of Waipahu Auto Exchange. That should cure any possible defect that might exist in the original adoption.

Mr. Cades: In order that our objection may be complete on the record, we object to the admissibility of these by-laws, first, because it affirmatively appears that they were not adopted by the corporation in accordance with the provisions of law and in fact are not by-laws; secondly, and equally important, because there has been no showing made—The statute providing that there is no constructive notice of the by-laws on outsiders, there is no showing made that we had or could have obtained actual notice of the by-laws; next, on the ground that it

appears from the evidence that has been adduced so far that even the statutory requirement of having a certified copy available, certified by the secretary and available for examination by the stockholders, which appears in this same section, was not complied with; next, on the ground that the only testimony that they acted as though these were the by-laws is a statement by the attorney that he assumed they were the by-laws because he had them in the file all during the existence of the corporation.

Since the movant has the affirmative burden of showing that this document either is the by-laws effective or that we had notice that they were by-laws and that there were [80] limitations brought home to us, the document is not admissible. For all those grounds we urge your Honor not to admit the document in evidence.

Mr. Saunders: If your Honor please——

The Court: Yes.

Mr. Saunders: If I could just clear up the purpose of our putting it in. We are not trying to show and we don't intend to indicate in any way the bank was on constructive notice that there were by-laws. We are putting the by-laws in evidence for the main purpose of showing that there was no express or implied authority in Anthony Yee to endorse checks in his capacity as president. The by-laws provide to the contrary. This is a matter of the internal workings of Waipahu Auto Exchange. The authority was given to the principal. The principal was Waipahu Auto Exchange. We are putting these in to show that they expressly provided in the by-laws the

manner in which checks could be signed, executed, and delivered. It has nothing to do with the notice of the bank.

The Court: In the absence of any meetings of either stockholders or directors with relation to these purported by-laws the offer is denied at the present time.

Mr. Saunders: If your Honor please, if I may call your attention to the testimony of Mr. Yokono yesterday, he said they had a meeting and all four of them read the articles [81] and by-laws at that time and signed them. He further stated that these were the by-laws under which the corporation acted. With that in mind, I ask your Honor to reconsider your ruling.

The Court: No, the ruling stands. Have these been marked for identification?

The Clerk: Yes, your Honor.

TAKESHI YOKONO

resumed the stand and testified further as follows:

Cross-Examination (Continued)

By Mr. Cades:

Q. Yokono, in your capacity as treasurer of the Waipahu Auto Exchange, did you have occasion to know anything about a payment of \$150 to Herbert Lee for the drawing of incorporation papers?

A. Yes.

Q. Did you make the payment?

A. Yes.

(Testimony of Takeshi Yokono.)

Mr. Saunders: If your Honor please, I move to strike that as being irrelevant and immaterial. It seems to me we are getting very far afield from the issues presented in this case.

The Court: Well, is this witness under cross-examination?

Mr. Cades: He is on general cross-examination again. He testified on direct that he was treasurer, and I am trying to probe his duties as treasurer.

Mr. Saunders: If your Honor please, he did not testify on direct that he was treasurer.

Mr. Cades: Since Mr. Saunders makes such a point of it, I have checked with my colleagues as to their notes, and if we have to check with the direct examination, we will have to do it.

Mr. Kidwell: The first question asked him indicates he was connected with Waipahu Auto Exchange. My notes don't indicate he was connected as treasurer.

Mr. Cades: If your Honor deems it pertinent, I think right at the beginning of the examination——

Mr. Saunders: If your Honor please, I happened to write down my questions and I know what questions I asked.

The Court: Some place it developed.

Mr. Saunders: If your Honor please, not on our direct. This is beyond the scope of the direct. If defense wants to make him his witness, we have no objection, but we want to have the right to cross-examine this witness. He is not our witness for any

(Testimony of Takeshi Yokono.)

purpose other than to show the execution of the document purporting to be the by-laws.

Mr. Cades: Your Honor, my memory may be at fault, but I have certainly understood if you put a man up, if he is put up for the purpose of showing his connection, I have a right to probe what his connection is. Our affirmative defenses [83] of negligence and that sort of thing, if they ever become pertinent, will be proved by our own witnesses. He is put on for the purpose of proving corporate authority. If on cross-examination I can't go into corporate authority, I would say, your Honor, that the rule about cross-examination was being unduly refined. It will take an awfully long time to try this case. I understand the need for orderly procedure. While he is here I want to probe into the questions of what as treasurer, or what he in his connection with the Company did do. That is the purpose of the examination.

Mr. Saunders: If your Honor please, Counsel for the defense is making another erroneous statement when he says the purpose of my putting him on was to prove authority. My purpose was limited to the express execution of the document purporting to be the by-laws. We intend to let that document speak for itself. We have no intention to bind ourselves by this witness on any problem of corporate authority. That is part of the affirmative defense that the defense has to show that payment was made to the payee. They must show that the

(Testimony of Takeshi Yokono.)

one actually paid was authorized by that corporation to collect that check.

All of this, furthermore, had to do with the meeting prior to the filing of the articles of incorporation and at that time Mr. Yokono was not treasurer, as a matter of fact, because there was no corporation in existence. [84]

The Court: Overruled.

Q. (By Mr. Cades): Mr. Yokono, did you have an office at Waipahu? Did you occupy an office belonging to the Waipahu Auto Exchange?

A. What kind of office?

Q. Well, did you draw a salary from the Waipahu Auto Exchange? A. Not yet.

Q. Never drew any salary? A. No.

Q. Well, how many hours a day did you put into your work for the Waipahu Auto Exchange?

A. Well, there wasn't any limited time. I just went as I pleased.

Q. You just went when you pleased. As a matter of fact, you had a full-time job running a store, didn't you? A. Yes.

Q. What is the name of the store?

A. Yokono Store.

Q. Yokono Store. What is that, a general store in Waipahu? A. Yes.

Q. And you were treasurer of this Auto Ex-

(Testimony of Takeshi Yokono.)

change on the side; isn't that right?

A. Yes. [85]

Q. You put in a limited amount of time every day or from day to day?

A. You mean to Waipahu Auto Exchange?

Q. Yes? A. Yes.

Q. When it was needed? A. Yes.

Q. And Anthony Yee is the only full-time employee that you had; isn't he? A. No.

Q. Who was the other full-time employee?

A. Shintaku.

Q. Full time? A. Yes.

Q. When did he become a full-time employee?

A. That I don't know. I have to look up the books.

Q. You would have to look up the books. Shintaku was never treasurer of the Company, was he?

A. No.

Q. You never delegated to Shintaku any of your duties as treasurer? A. No.

Q. Did you have access to the files and records of the corporation? A. Yes. [86]

Q. At Waipahu. Did you ever see in the files and records of the corporation a set of by-laws that were certified there? A. Yes.

Q. You did see? A. There was a copy.

Q. Where? There was a copy; where was it?

A. In the office.

Q. A signed copy? A. I don't know.

Q. You don't. When you say a "signed copy," do you mean the by-laws, which is Exhibit 1, for

(Testimony of Takeshi Yokono.)

identification, or do you mean the articles of association which is Plaintiff's Exhibit C? Which one do you have in mind?

A. I believe both of them were there. Copies.

Q. Copies of both were in the office?

A. Yes.

Q. Kept by whom?

A. Kept—What is the question?

Q. Who kept the records down there in the office?
A. I did mostly.

Q. You did yourself? A. Yes.

Q. They were kept in your office then?

A. No, Waipahu Auto Exchange office. [87]

Q. You were only there from time to time. Who was in charge of the office there? Who was in charge of the Waipahu Auto Exchange office?

A. Shintaku.

Q. When he became a full-time employee; is that right?
A. Yes.

Q. The secretary of the corporation was Mrs. Pang?
A. Yes.

Q. Who is Mrs. Pang?

A. Mrs. Pang is Mrs. Pang.

Q. Is she a resident of Waipahu? A. Yes.

Q. Is she related to any of the boys in this Company?
A. To Anthony Yee.

Q. She is related to Anthony Yee?

A. Yes.

Q. She was not very active as secretary, was she?
A. No.

(Testimony of Takeshi Yokono.)

Q. Did she ever sign any papers as secretary, contracts, checks, or anything else relating to the corporation? A. No.

Q. She was just an inactive secretary, dummy secretary, wasn't she?

A. Well, she asked us to do all the work for her. She was not able to do it. [88]

Q. She was not able to? Why?

A. Well, she asked us. I don't know why.

Q. So she was a dummy secretary?

Mr. Saunders: If your Honor please, I object to the question.

Mr. Cades: All right, I will withdraw the question.

Q. (By Mr. Cades): Did she ever keep any records of any meetings or of any corporate transactions? A. No.

Q. In fact, she as secretary didn't know what the corporation was doing, at all, did she?

Mr. Saunders: If your Honor please, I object to that as leading. A. I do not think so.

Mr. Cades: This is on cross-examination.

Q. (By Mr. Cades): You don't think so?

Mr. Saunders: If your Honor please, could we have the objection ruled on and the answer stricken prior to the ruling?

The Court: Overruled.

Mr. Saunders: If your Honor please, Counsel for the defense has made a statement; he said this is cross-examination, leading questions are proper. That exactly is the whole point. It goes to our

(Testimony of Takeshi Yokono.)

objection throughout this entire line of testimony. Counsel for the defense is using [89] this witness as if he had been called on direct testimony by us for all these things and is therefore asking leading and suggestive questions to a witness who is easily impressed. It is obvious from his demeanor on the stand he does not get the import of every question. His answers are "yes" and "no" without full import of the question. It is highly prejudicial to our case because it is allowing the defense to ask leading questions on a matter which is properly their defense on a witness which is properly their own witness and not allowing us the privilege of cross-examination.

The Court: I don't know that the witness is easily impressed and I don't know that he is without clear information on all these matters. I don't consider the objection well grounded.

Mr. Saunders: Am I to understand, then, that there is an open field day on anything the defendant wants to go into on this witness?

The Court: Well, I am not wishing to give you that understanding.

Mr. Saunders: The only thing that I want to make clear is for the record to show we object to all of the questions that defendant is now asking. We would like to have a continuing objection on the grounds that our direct examination was limited solely to the scope that this witness was called to identify. [90]

(Testimony of Takeshi Yokono.)

The Court: I know you have made that objection two or three times. I don't consider it valid on that basis. Counsel for the defense may ask questions at any time that you would have a perfect right to object to and have a ruling on, but on a general objection I, up until now, can't see anything that justifies a sustaining of the objections. It has been ruled on adversely.

Mr. Saunders: My only point in asking that is that otherwise I am going to have to be a literal "jack-in-the-box" on every question he asks.

The Court: I don't know that you do, but you have discretion in the matter. I have already ruled on your main proposition, that the witness having been called for a limited special purpose, on cross-examination Counsel can't go outside of that scope. I have already ruled on that and said that he could under the circumstances in the case.

Mr. Saunders: Your Honor said that he could go without the scope?

The Court: Yes, under the circumstances of the case that he can inquire as to all matters that he has inquired into.

Q. (By Mr. Cades): Mr. Yokono, I show you what purports to be——

Mr. Cades: I will strike that.

Q. (By Mr. Cades): Did you, in your capacity as [91] treasurer, attend to the making of deposits for this corporation? A. What is that?

Q. Answer so the judge and counsel can hear. You say that is right? A. I don't understand.

(Testimony of Takeshi Yokono.)

Mr. Saunders: Could the witness please be admonished to speak louder. The acoustics are very poor.

Mr. Cades: The acoustics are very bad. Speak out so he can hear you.

The Court: Repeat the question.

(Question read.)

The Court: You mean bank deposits?

Mr. Cades: Bank deposits for Waipahu Auto Exchange.

The Witness: You mean I did that?

Q. (By Mr. Cades): Did you? A. Yes.

Q. That was a part of your regular duties to attend to making deposits in the bank for Waipahu Auto Exchange?

A. I guess that was my duty.

Q. That was your duty. And you were supposed to know about all the cash receipts and the cash disbursements of the Company; isn't that right?

A. I believe so.

Q. All right, do you know—I show you here what purports [92] to be a duplicate deposit slip into the Bank of Hawaii for Waipahu Auto Exchange, January 21, 1949, and I ask you whether you have ever seen either that slip, or a duplicate of that slip before? A. Yes.

Q. Did you make up the original of that?

A. I believe so.

Q. You believe you did.

Mr. Cades: If your Honor please, I offer this

(Testimony of Takeshi Yokono.)

in evidence, and I offer to connect it up. The particular exhibit shows a currency deposit of \$2,721 on January 21, 1949. It is my purpose to connect that deposit up with some of the checks that are the subject of dispute in this case.

The Court: Well, you had better just have it marked for identification.

Mr. Cades: I think that is perhaps right. Before I do that—

Q. (By Mr. Cades): Do you know, Mr. Yokono, where the \$2,721 that was deposited on that date came from?

Mr. Saunders: If your Honor please, I object to that. This is a part of the defendant's affirmative case. If they want to make this witness their own, that is for them, but at present it is beyond the scope of cross-examination and we should have the right—Furthermore, it is beyond the authority of this witness. [93]

Mr. Cades: I am trying carefully, your Honor, to preserve what I understand to be the scope of your Honor's ruling. I am not trying to put on the affirmative defenses of negligence and the other four or five defenses in the direct case. As you can see, the witness is not a very willing witness. I am trying to probe to show your Honor that these by-laws, which have been offered, and all this talk of who had authority is without the slightest—with only the flimsiest kind of foundation. The secretary, who is the only other person who would know about

(Testimony of Takeshi Yokono.)

it, by his own testimony didn't know anything about it. He was a part-time employee. Obviously, it is pertinent, when you are discussing authority, for your Honor to know who Anthony Yee was in this picture. I mean, this is all going to the very purpose for which he was put on the witness stand, to wit, having to do with authority, and for which Mr. Lee was put on. Your Honor will remember there has been testimony, out of turn of course, but that these by-laws were acted on as though they were the by-laws of the Company. Now I certainly can show anything that would prove that that is not true, and this is right along the line.

The Court: Go ahead. Overruled.

The Witness: I have forgotten the question.

Mr. Cades: Will you read the question?

(Question read.) [94]

A. I believe that was some of the money from the shares stocks.

Q. But you don't know?

A. I guess that was the money.

Q. You guess that. Were there any books of account in existence at the time from which you can tell the Court where that money came from?

A. I am sure this money came from the stocks.

Q. Will you answer the question, please. Did the corporation have books of account at this time? I am talking about January 21, 1949. Can you answer that question? Do you understand the question, Mr. Yokono? A. No.

(Testimony of Takeshi Yokono.)

Mr. Cades: Read the question.

(Question read.)

A. Well, I do not—I do not know off hand.

Q. You do not know off hand. You were the treasurer of the Company; were you a bookkeeper?

(No response.)

Q. Well, you know whether you were a bookkeeper or not. Can't you answer?

A. You mean actual writing the books?

Q. Yes. Did you keep books?

A. No, I kept all the datas.

Q. You kept what? [95] A. The datas.

Q. Data, but no books? A. No.

Q. As a matter of fact, the books were written up in this Company somewhere around June or July, weren't they, of 1949? A. I guess so.

Q. Don't you know so?

A. Well, I don't know off hand the dates.

Q. I have some heavy books here, a journal and ledger that are marked Waipahu Auto Exchange. You have seen these books before, haven't you?

A. Yes.

Q. These books were bought about June, were they not, June or July of 1949?

A. I believe so.

Q. And they were written up sometime after that, after the Yee defalcation was discovered; isn't that right?

A. I don't know exactly what time. It must be about that, though.

(Testimony of Takeshi Yokono.)

Q. But it was after Yee had severed his active connection with the Company, stopped being the active president?

A. I guess so. It was about then.

Q. All right. Tell the Court, Have you any data, as you call it, or books, or records, as treasurer, from which [96] you can tell the Court where that currency came from that was deposited in the Bank of Hawaii on January 21?

A. I remember having a simple form of book-keeping books easy. I forgot what the name of that. It was an easy way. Easy bookkeeping form, or something like that.

Q. I am told that there are in the court room all of the books and records of the Company, which have come from the custody of the trustee on dissolution, in that box.

Would you mind looking through the books and records, or is there any material from which you could be able to tell the Court what the source of that currency is? Would you mind looking and seeing? Step down.

Mr. Saunders: If your Honor please, again this all is part of the defendant's case. They have had a chance to go through all the records. It is obvious this witness is confused. If they make him their witness, it is proper for them to go into these things and prove their payment. I am sure if they ask a few leading questions, they can deduce from whence these payments came. It is obvious they didn't

(Testimony of Takeshi Yokono.)

come from these checks. The first check is made on January 21. This deposit was made January 21. All of these records have been in the possession of the defendant since last Friday. This witness has been available to them. There is nothing sacred about this witness. As far as we are concerned he is properly his witness. We only used him for the limited [97] purpose of the by-laws.

Mr. Cades: I was just getting an excerpt. You said it is obvious it didn't come from these checks because the first check was cashed on January 21 and the first deposit was January 21.

The Court: January 1 or 21?

Mr. Cades: Twenty-first, the same day, your Honor, that the first check was cashed was the deposit. Here you have a contention of the plaintiff that they operated under by-laws. Here is the treasurer, and I am trying to probe to see whether that is correct. I admit it is difficult, because he is reluctant and unwilling, but I am doing the best I can to find out whether that is true. So far it appears they haven't operated under by-laws. The by-laws provide they should keep records and vouchers, and I want to know where they are.

Can you find anything, Mr. Yokono?

Mr. Saunders: If your Honor please, may I make this suggestion. Let's make it off the record.

(Statement off the record.)

Mr. Cades: Mr. Saunders misunderstands the tremely technical case that the plaintiffs are bring-

(Testimony of Takeshi Yokono.)

whole scope of the examination. This is an ex-
ing. They are going to try to make the bank respon-
sible because there weren't resolutions passed and
one thing and another. We want the Court to
see [98] how this corporation operated. I want a
visual inspection by the Court of this treasurer of
the corporation examining his data and records to
determine what happened to all of this cash, because
they are attempting by this case to place a burden
on the bank which if any bank assumed it would
have to go out of the banking business forthwith.
I mean, that is obviously the purpose of the exami-
nation.

The Court: Yes, if you think the witness is con-
fused at the present time, let's take a recess until
this afternoon and then go ahead, and he should
be over any confusion that he might have. He is a
man who has been in the trading business for many
years. I think he can take care of himself. What-
ever confusion he might have would be just tem-
porary. He can no doubt answer simple questions,
at least, without confusion. What time do you want
to adjourn to? Half past 1 or 2 o'clock?

Mr. Cades: Half past one would be very agree-
able.

The Court: Is that satisfactory?

Mr. Saunders: Satisfactory to us, your Honor.

(Thereupon, at 11:25 a recess was taken until
1:30 p.m. of the same day.) [99]

(Testimony of Takeshi Yokono.)

Afternoon Session, 1:37

TAKESHI YOKONO

resumed the stand and testified further as follows:

Mr. Buck: If the Court pleases, before we continue, my notes that I took this morning indicate—I don't know that they are correct, but I think we could possibly cut down the objections if you would clarify whether they are correct or not—that the witness, Mr. Yokono, was to be treated from there on as a witness of the defense. However, later there was an objection to one of the questions as being leading, which was overruled. I think it would clarify the position we take as to objections if we could have a ruling from the Court whether or not this witness is to be considered a witness for the defense or whether this is considered by the Court to be proper cross-examination.

The Court: I didn't make a ruling at any time that he was to be considered a witness for the defense, but I did hold that the examination up to the point in question was to my mind within the reasonable scope of cross-examination.

Mr. Buck: Thank you.

The Court: I don't recall any question propounded to the witness by the defense that was objected to on the ground that it was leading and was overruled. I don't recall that, but you could be right in your view. [100]

(Testimony of Takeshi Yokono.)

Cross-Examination

(Continued)

By Mr. Cades:

Mr. Cades: Miss Reporter, would you mind reading to the witness; there was a question the witness had not answered, your Honor will recall, accounting for currency in the deposit of January 21, and he was asked to come down and examine whatever data was available. Would you mind reading the question, Miss Reporter, please.

The Reporter (Reading): "Q. I am told that there are in the court room all of the books and records of the Company, which have come from the custody of the trustee on dissolution, in that box.

"Would you mind looking through the books and records, or is there any material from which you could be able to tell the Court what the source of that currency is? Would you mind looking and seeing? Step down."

Mr. Saunders: If your Honor please, I object to the question as being irrelevant and immaterial and not within the scope of the direct examination.

Mr. Cades: Did you understand the question, Mr. Yokono?

Mr. Saunders: If your Honor please, we don't like to jump up and down and interrupt the testimony. Would it be possible to allow us a continuing objection to all questions [101] pertaining to the banking procedure which Mr. Cades is about to go into on the grounds that I just asserted?

(Testimony of Takeshi Yokono.)

The Court: Well, I think it has been made sufficiently clear as to what he is going into has just now been recently gone into so that I think I can entertain that as a general objection, and within that particular range I hold that the examination is proper and the objection is overruled. You may have an exception.

The Witness: May I see the deposit slip?

Mr. Cades: In order to have the record clear, I will restate my question.

Q. (By Mr. Cades): I show you here the deposit slip of January 21, 1949, Waipahu Auto Exchange, and the Bank of Hawaii, and particularly the item "Currency, \$2,721," deposited on January 21. I will ask you whether from all of the data, books, and records of the corporation you are able to tell the Court what the source is of that currency?

A. Yes.

Q. Please point to the records and the books from which you can tell. Come down and get them.

(Witness leaves stand.)

A. Sales book here.

Q. Take whatever you want back to the stand, please.

(Witness resumes stand.)

Q. Now what book or record will disclose what the [102] source of that currency is?

A. In this \$2,721, we have these sale of a station wagon to John Saylor.

(Testimony of Takeshi Yokono.)

Q. John B. Saylor?

A. Which he had a cash payment of \$300, and we took a trade-in of an old car for \$700, so there is a \$300 cash receipt there.

Q. Yes.

A. Then on the same day we sold——

The Court: What date?

The Witness: January 20.

A. (Continuing): We sold to Ignatio Sualit, we sold him a Willys panel wagon, panel delivery wagon, which he paid in cash \$2,041.55, which I marked "paid" on the bill here and gave receipt to Sualit. And this other deposit, tire sales, which we made previous to that car sale.

Q. What is the amount of your tire sales previous to the car deal?

A. \$105.37 and \$28.56, which accounts for all these—plus——

Mr. Saunders: May I ask the witness to literally shout. I can't hear a thing.

The Court: Loud.

The Witness: On this \$2,721, some of the money which we had from the stocks issued. [103]

Q. (By Mr. Cades): All right. How much from the stocks issued?

A. Well, the baalnce from this cash receipts we had sales here.

Q. I am asking you, Do you have any book or record to show what was received from the stock?

A. Not right off here.

Q. Not right off. So that, if I understand your

(Testimony of Takeshi Yokono.)

answer, by looking at the books and records you are able to testify—this is just your best opinion, isn't it, that the \$2,700 plus came in part from what? From sales of tires; is that right? A. Yes.

Q. Sales of cars? A. Yes.

Q. And sale of what? Stock in your Company? A. Yes.

Q. And you think that is what made up the total of \$2,700?

A. No, twenty-eight—this is the total.

Q. Total of \$2,854.93, which is the total deposit?

A. Yes.

Q. That is as close as you can get to it from the books and records? A. Yes. [104]

The Court: Are there two deposit slips there?

Mr. Cades: If your Honor please, I will offer this in evidence at this time as having been identified as a deposit so that it may tie in with his testimony.

Mr. Saunders: Your Honor, may I have the same objection to the introduction of this? It is improper to introduce an exhibit on cross-examination.

The Court: A little louder.

Mr. Saunders: We object on the ground that it is irrelevant, immaterial, and incompetent, that it is improper to be introduced on cross-examination, and that it is not within the scope of the direct examination.

The Court: Overruled.

The Clerk: Defendant's Exhibit No. 3.

(Thereupon, the document above referred to

(Testimony of Takeshi Yokono.)

was received in evidence as Defendant's Exhibit No. 3.)

Q. (By Mr. Cades): Mr. Yokono, I show you, as produced from the records of the corporation in this court what looks like a sales slip to John B. and Rose L. Saylor, Invoice No. 4252, dated January 12, 1949, and at the bottom of that sales slip it shows "Check Rec'd F. S. F. Ltd." Do you know what those initials refer to, F. S. F. Ltd. it looks like? Do you know what those initials refer to?

A. That is the Federal Service Finance.

Q. Federal Service Finance, Limited, isn't it? [105]

A. Yes.

Q. Does that indicate the receipt of a check on the Saylor deal in the amount of \$1,337?

A. We received a check from Federal Services Finance for \$1,337, but as this case broke up, came to open, well, we were in doubt as to which check belonged to which deal.

Q. You have no records to show which check belonged to each deal; is that it?

A. Yes.

Q. Is this the sales book of the Company that I have showed you? Can you identify that as the sales book of the Company?

A. The original was that one. This is the first sales book.

Mr. Cades: The witness is referring to a sales book which has on the cover of it—well, let's say a sales book which begins with numbers 03853.

Q. (By Mr. Cades): That is the one you refer to?

A. Yes.

(Testimony of Takeshi Yokono.)

Q. Well, now, let me refer you to another book, a sales book which begins with numbers 4251. Isn't this a sales book? And on the cover of the second book I see the words "New Car." Do you know whose writing that is? "New Car"?

A. This must be Shintaku's writing.

Q. Shintaku's writing. Shintaku was the vice president [106] of the Company? A. Yes.

Q. Now just refer to that book which has Invoice No. 4252, and I ask you, Is that a regular sales invoice of the Company?

A. This is the regular, original.

Q. Just answer the question. Can you identify this book with Mr. Shintaku's writing on the outside as a regular book of account of the Company, or can't you, or don't you know?

A. It must be.

Q. Are you able to say, as treasurer of the Company, whether it was or was not?

A. Before answering that question, we opened the business with this book here, but as we came about to sell new automobiles, we transferred new automobile sales to a new book so that we can identify car sales and other tire sales, and so forth.

Q. All right. Please now identify for the Court the book into which you transferred your new car sales.

A. That book comes to this serial number of 4251.

Q. Then this is the book in which new car sales were recorded; is that right? A. Yes.

(Testimony of Takeshi Yokono.)

Mr. Cades: If your Honor please, I offer this in [107] evidence. Under the purported by-laws he is supposed to be the custodian of the records and books of the Company.

Mr. Saunders: If your Honor please, I object to Counsel for the Defendant making reference to by-laws when on his own motion they were denied in evidence. According to that, I object to the admission of this document. By the admission of the witness on the stand, this is not the original book. It is a transfer book. The best evidence would be the original book. Further than that, the matter is irrelevant and immaterial and not within the scope of direct examination.

Mr. Cades: For the purposes of completion, your Honor, I will offer both together. They have both been identified, the original and the transcript.

Mr. Saunders: Same objection, your Honor.

The Court: Overruled. Received in evidence.

The Clerk: As Defendant's Exhibits 4-A and 4-B.

(Thereupon, the documents above referred to were received in evidence as Defendant's Exhibits 4-A and 4-B.)

The Court: Those are books that begin with numbers 03853 and 4251?

The Clerk: 4251, that's right.

The Court: Exhibit what?

The Clerk: Exhibits 4-A and 4-B. [108]

Q. (By Mr. Cades): Mr. Yokono, I show you a

(Testimony of Takeshi Yokono.)

letter addressed to Waipahu Auto Exchange from Federal Services Finance Corporation, dated March 16, 1949, and I will ask you, on the third page of the letter there is a legend "Accepted Waipahu Auto Exchange by Anthony Yee"; I ask you first whether you can identify that signature as the signature of Anthony Yee?

A. It looks like Anthony Yee's signature, but I don't know.

Q. It looks like Anthony Yee's signature, but you don't know. Would you care to compare it with the signature that you identified on these purported by-laws as being the signature of Anthony Yee?

A. It looks similar.

Q. It looks similar. Mr. Yokono, did you ever see this letter addressed to the Company of which you were treasurer before now?

A. No.

Q. You have never seen the letter?

A. No.

Q. And the letter was not taken up with you?

A. No.

Q. So that if Anthony Yee signed the letter and made the arrangements, he made them without your approval or knowledge?

A. It seems that way. [109]

Q. You testified that you knew that he had made some arrangements with finance companies; is that right?

A. Yes.

Q. Who was giving the orders on what the arrangements should be, you or Mr. Yee?

A. What is the question?

Mr. Cades: Read the question.

(Testimony of Takeshi Yokono.)

(Question read.)

The Witness: You mean the arrangements for the loans?

Mr. Cades: Arrangements with the finance companies.

A. I don't recall, but it must have been—it must have been Yee.

Q. (By Mr. Cades): No one except Yee——

A. What is that?

Q. No one except Yee had anything to do with it; is that right?

Mr. Saunders: Your Honor, the question is leading and suggestive and calls for something entirely without this witness' knowledge.

Mr. Cades: This is cross-examination, and he can answer. I am not trying to be unfair to the witness; he is just hesitant, that is all.

The Court: Well, I think you had better reframe the question. [110]

Mr. Cades: Very well.

Q. (By Mr. Cades): Mr. Yokono, weren't the arrangements concerning the relationship or the dealings of your Company with the finance companies left entirely to Mr. Yee? A. Yes.

Q. Yes. So that in the ordinary course of business when Mr. Yee entered into a letter arrangement like this, he wouldn't take it up with you as treasurer, would he?

A. Well, I didn't see this letter. He had it with him, I guess.

Q. All right. Now, as a matter of fact, didn't

(Testimony of Takeshi Yokono.)

you have occasion to tell Mr.—Do you know who Mr. Abel Medeiros is? A. Abel Medeiros, no.

Q. Do you know the Ideal Finance and Thrift Company? A. Yes, I know where it is.

Q. And do you know who Mr. Abel Medeiros is in that Company? Did you ever have occasion to tell Mr. Abel Medeiros that all the arrangements for financing were to be made by Mr. Yee?

A. I haven't spoken——

Mr. Saunders: I object. He has already stated he doesn't know who Mr. Medeiros is.

Mr. Cades: Let him answer the question. I don't think the witness should be prompted. [111]

A. I haven't seen——

Mr. Cades: Did I say "telephone conversation"? Read the question.

(Question read.)

A. No.

Q. (By Mr. Cades): Did you ever have any telephone conversations with Mr. Medeiros, as far as you know? A. Myself?

Q. Yes. A. No.

Q. You know of some conversations that were had with Mr. Abel Medeiros, don't you?

Mr. Saunders: If your Honor please, the answer calls for hearsay.

Mr. Cades: I am not going to ask him the gist of them. I want to know whether he knows of such conversations.

Mr. Saunders: There is no way he could know if he didn't make any.

(Testimony of Takeshi Yokono.)

The Court: Overruled.

The Witness: May I have the question, please.

(Question read.)

The Witness: Conversations with whom?

Mr. Cades: Between Mr. Abel Medeiros and representatives of Waipahu Auto Exchange.

A. Not that I know of. [112]

Q. (By Mr. Cades): Were you ever present when Mr. Shintaku talked with Mr. Abel Medeiros?

A. No.

Q. So that as far as your testimony is concerned, you don't know anything about the Ideal Finance and Thrift Company, or dealings with your Company with them?

A. Not until the case broke up.

Q. Until the case broke up; that is, during the term until Mr. Yee ceased to be active in the business, you never heard of any arrangement that was ever made with the Ideal Finance and Thrift?

A. No.

Q. None? A. No.

Q. Mr. Yokono, on December 21, 1948, didn't your Company buy a used car?

A. Could you identify the car so I can recall?

Mr. Saunders: If your Honor please, in the meantime could we make it clear that we would like to renew the same objection we made. He has kind of gotten far afield from the banking situation now and is going into car sales and finance arrangements. We would like to make it clear we are objecting

(Testimony of Takeshi Yokono.)

to the entire line of testimony now being presented by Counsel for the defense.

The Court: Well, it more or less seems to me to go [113] to the matter as to what this witness, who said he was treasurer of the Company, knows, or knew, about the natural affairs of the Company. I think it is permissible.

Mr. Saunders: Could we clarify one thing first, your Honor. Could we have the reporter check back on her notes and see whether Mr. Yokono ever stated that he was treasurer. My recollection is that he did not.

The Court: Well, from my angle it doesn't make any difference in the situation whether it was said on direct examination or whether he said it on cross-examination. I am sure that he made the statement that he was, and it was in connection with either the articles of incorporation, had relation to that, or as to the by-laws, or purported by-laws, whichever one you may choose to refer to those as, and the fact has been submitted on the stand, claimed that he was the treasurer. Examinations as to his knowledge of the financial affairs of the Company are matters of importance.

Mr. Cades: Before I overlook this, your Honor, I would like to have this letter, identified as letter of March 16, 1949, from the Federal Services Finance, admitted in evidence.

The Court: Is that the letter you were requesting the witness——

(Testimony of Takeshi Yokono.)

Mr. Cades: That is the letter, and he has identified it.

The Court: Letter of what date? [114]

The Clerk: March 16, 1949.

Mr. Saunders: I am afraid I didn't hear that. Did you offer that in evidence?

Mr. Cades: I did.

Mr. Saunders: If your Honor please, we object on the grounds (1) that it is improper to identify a document, or introduce it into evidence, on cross-examination; (2) that there is no showing that this letter was ever delivered to Waipahu Auto Exchange; (3) that it is irrelevant and immaterial.

The Court: Well, it isn't offered as an exhibit at this time. It is merely offered for the file.

Mr. Cades: I haven't any objection to its merely being marked for identification. It is all right with me.

The Clerk: Defendant's C, for identification.

(Thereupon, the document above referred to was marked Defendant's C, for identification.)

(Testimony of Takeshi Yokono.)

DEFENDANT'S EXHIBIT C

Federal Services Finance Corporation

718 Jackson Place, N. W.

Washington 6, D. C.

March 16, 1949,

Waipahu Auto Exchange,

Waipahu,

Oahu, T. H.

Gentlemen:

As more 1949 models appear on the market, it becomes necessary for us to readjust rates and terms on the older models.

We therefore seek your co-operation in abiding by the following rules in drawing up contracts for discounting with us:

1. That at least $\frac{1}{3}$ down payment be obtained on each car sold and contract be limited to the months shown below after each model. In no case will a check be issued by us for more than $\frac{2}{3}$'s of the "un-adjusted" Kelly Blue Book Retail Price.

1949 and 1948	24 months
1947	21 months
1946	18 months
1942 and 1941	15 months
1940	12 months

2. On the following models, the time will be limited as shown and the check that we issue shall

(Testimony of Takeshi Yokono.)

not exceed 50% of the "unadjusted" Kelly Blue Book Retail Price.

1939	10 months
1938	8 months
1937	6 months

3. Sales to service personnel should be restricted to officers and married non-commissioned officers of the first three grades, if you desire to discount the contract.

4. Any exceptions to the above must either be confirmed by us prior to delivery, or the deal made on a "subject to financing" basis.

The following basic annual rates apply on the models below:

Cars less than 6 months old	5%
1948-1947	6%
1946	7%
All cars older than 1946 models	8%
Add to all contract for investigation—\$3.50 and \$1.00 for title transfer	

Contracts running less than a year are subject to higher rates than the annual rate. The age of the car determines the basic rate and the short term rate will be found in the schedule below. Rates are shown on a monthly, annual and actual effective interest rate basis.

(Testimony of Takeshi Yokono.)

Basic Rate

5%

No. of Mos.	Mo. Rate	Ann. Rate	Eff. Rate
2	2	12	15.96
3	2.5	10	14.88
4	2.66	8	12.60
5	2.9	7	11.55
6	3.0	6	10.20
7	3.5	6	10.44
8	4.0	6	10.56
9	4.5	6	10.68
10	4.10	5	8.88
11	4.57	5	8.93
12	5	5	8.98
13		5	9.00
14		5	9.00
15	6.25	5	9.04
16		5	9.06
17		5	9.96
18	7.5	5	9.06
21	8.75	5	9.06
24	10.0	5	9.06

6%

No. of Mos.	Mo. Rate	Ann. Rate	Eff. Rate
2	2	12	15.96
3	3	12	17.88
4	3	9	14.28
5	3.3	8	13.44

(Testimony of Takeshi Yokono.)

No. of Mos.	Mo. Rate	Ann. Rate	Eff. Rate
6	3.5	7	11.88
7	4.08	7	12.11
8	4.66	7	12.27
9	5.25	7	12.42
10	5.5	6	11.68
11	5.5	6	10.80
12	6	6	10.92
13	6.5	6	10.92
14	7	6	10.92
15	7.5	6	10.92
16	8	6	11.04
17	8.5	6	11.04
18	9.0	6	11.04
21	10.5	6	11.04
24	12.0	6	11.16

7%

No. of Mos.	Mo. Rate	Ann. Rate	Eff. Rate
2	2	12	15.96
3	3	12	17.88
4	3.33	10	15.84
5	3.33	8	13.08
6	4	8	13.44
7	4.66	8	13.68
8	5.33	8	13.92
9	6	8	14.04
10	6.66	8	14.16
11	6.38	7	12.60

(Testimony of Takeshi Yokono.)

No. of Mos.	Mo. Rate	Ann. Rate	Eff. Rate
12	7	7	12.67
13	7.58	7	12.71
14	8.16	7	12.72
15	8.75	7	12.79
16	9.33	7	12.80
17	9.9	7	12.83
18	10.5	7	12.84

8%

No. of Mos.	Mo. Rate	Ann. Rate	Eff. Rate
2	2	12	15.96
3	3	12	17.88
4	3.33	10	15.84
5	3.75	9	14.88
6	4.5	9	15.24
7	5.25	9	15.60
8	6	9	15.72
9	6.75	9	15.96
10	7.5	9	16.08
11	7.33	8	14.28
12	8	8	14.40
13	8.66	8	14.52
14	9.33	8	14.52
15	10	8	14.52

It is understood and agreed that the difference between our charge to you and your charge to the purchaser will be your reserve. However, your re-

(Testimony of Takeshi Yokono.)

serve cannot be greater than $\frac{1}{3}$ of the charge to the customer. In other words, if you charge the customer 12% and our rate on the particular model is 6%, we will raise our rate to 8% in such an instance. This is to avoid high charges on late model automobiles.

Insurance in accordance with the following rules should be included in the contract.

1949 through 1946—comprehensive and \$50
deductible collision

1942 through 1937—fire and theft only an
\$100 deductible collision

The above may be waived if the purchaser has an effective policy for at least the above coverages and the policy is presented to us when the contract is discounted.

If the above terms are satisfactory to you, please indicate your acceptance by signing the enclosed copy on the line provided below.

Very truly yours,

FEDERAL SERVICES

FINANCE CORPORATION,

/s/ H. P. GILLESPIE,

Manager, Honolulu Branch.

Accepted:

WAIPAHU AUTO
EXCHANGE,

By /s/ ANTHONY YEE.

Marked for identification March 16, 1950.

(Testimony of Takeshi Yokono.)

Q. (By Mr. Cades): Now, referring to this Ideal Finance transaction, don't you recall that on December 21 your Company bought a car from somebody by the name of Mr. Pointer?

A. Could you tell me what kind of a car it was?

Q. Well, do you have a record—In the records and files of the Company there do you have any data as to the cars that you purchased?

A. May I see that. (Handed to witness.) I can recall there was a private financing of myself and Anthony Yee [115] to a certain station wagon, but I don't know if that is the car you are referring to or not.

Q. By "private financing" what exactly do you mean?

A. I mean before we had the corporation.

Q. Well, I am referring to a deal on December 21. That was after the corporation.

A. Oh, December 21.

Q. Have you any records here of the corporation that would throw any light on that purchase?

A. I don't think so.

Q. You don't think so. Well, maybe I can refresh your recollection. Do you know that the corporation bought a car and undertook to pay for the car by paying to Ideal Finance the cost price of the car, or a substantial portion of that? Do you remember anything like that? A. No.

Q. Did the Corporation ever make payments to the Ideal Finance of some money that was borrowed there in order to obtain that car?

(Testimony of Takeshi Yokono.)

A. Borrowing money from the Ideal Finance?

Q. Yes. A. Not that I know of.

Q. Did you ever pay any money to Ideal Finance on a contract?

A. From the Waipahu Auto Exchange? [116]

Q. Yes. A. No.

Q. You never did during the life of the Company? A. No, as far as I know, I haven't.

Q. You haven't as treasurer? A. No.

Q. You have no knowledge of Mr. Medeiros' calling down to Waipahu to find out whether Yee was authorized to turn over a contract to the Ideal Finance? A. No.

Q. Just think carefully. You have no memory of that? A. No.

Q. And before this case broke you never heard of any financing at Ideal Finance? A. No.

Q. None? A. No.

Q. Will you examine whatever records are necessary, as treasurer of the Company, and tell the Court whether on January 20 you didn't pay to Territorial Motors, Limited, the sum of \$3,585.52.

Mr. Saunders: What is the date of that?

Mr. Cades: January 20, 1949.

The Witness: Pay to Territorial Motors?

Mr. Cades: Yes. [117]

A. Yes, we paid for the cars.

Q. (By Mr. Cades): Did you pay that by a cashier's check purchased from the Bishop National Bank?

(Testimony of Takeshi Yokono.)

A. No, I got—I drew my savings out of State Loan and with that money I paid.

Q. You drew your savings out of the State Loan and you paid it in cash to Territorial Motors?

A. In check.

Q. What kind of a check?

A. It was a cashier's check from State Loan.

Q. A cashier's check from State Building and Loan? A. Building and Loan.

Q. I show you a cashier's check dated January 20, 1949, drawn to the order of Territorial Motors, Limited. It is identified as Check No. 9166. I ask you whether you have ever seen that check before?

A. No.

Q. You never saw the check. Do you know whether Mr. Anthony Yee purchased this check from the Bishop Bank? A. No.

Q. You have no knowledge? A. No.

Q. Did you turn over any money to Mr. Yee to purchase a check, any cash, currency, checks, or anything? A. No. [118]

Q. No. In other words, you don't know anything about this check, this cashier's check?

A. No.

Q. Well, will you look at all your books and records, and everything else there is in the court, and explain to the Court what the source was of the money that was used to purchase that cashier's check, please? Take all the time you want.

Mr. Saunders: If your Honor please, he already testified he had never seen the check before, that he

(Testimony of Takeshi Yokono.)

didn't know anything about it, and now he is asked a question to tell where the money came from which he used to purchase the check. It is contrary to what the witness has already stated.

The Court: Well, I suppose the purpose is to find if it is represented in the books.

Mr. Cades: That's right, exactly.

Q. (By Mr. Cades): Do you know whether that check is represented in any of the books of the Company?

A. If I look, sure, maybe I might be able.

Q. Well, in order not to hold up the matter, at the next recess will you look through the books?

Mr. Cades: In the meantime, I would like this check to be marked for identification.

The Court: What is the amount of the check?

The Clerk: \$3,583.52. [119]

The Court: Yes. All right, it may be marked for identification.

The Clerk: It is \$3,585.

The Court: "Three" you said.

The Clerk: The perforation is through it.

The Court: All right.

The Clerk: That is Defendant's D, for identification.

(Thereupon, the document above referred to was marked Defendant's D, for identification.)

FOR DEPOSIT WITH
BISHOP NATIONAL BANK OF HAWAII
TO THE CREDIT OF
TERRITORIAL MOTORS LTD

ALL PRIOR ENDORSEMENTS GUARANTEED
ANY BANKS BANKER
PAID TO THE ORDER OF
JAN 20 1940

59-131

BISHOP NATIONAL BANK

OF HAWAII AT HONOLULU
WAIKIKI BRANCH

PAY TO THE
ORDER OF

HONOLULU, HAWAII, JAN 20 1940

No. 9166

TERRITORIAL MOTORS LTD.

\$3,583.52

THREE THOUSAND FIVE HUNDRED AND 52/100

CASHIER'S CHECK

[Signature]

BRANCH MANAGER ASSISTANT TELLER



(Testimony of Takeshi Yokono.)

Q. (By Mr. Cades): I show you a deposit ticket, what looks like a duplicate of a deposit ticket, of the Waipahu Auto Exchange, deposit in the Bank of Hawaii, of May 2, 1949, showing the deposit of a Bishop Bank check, \$3,582.78. Do you recall the deposit of that check on May 2? A. Yes.

Q. Will you tell the Court what that deposit was?

A. We had to pay Territorial Motors for the purchase of two cars and at this time we were out of funds. So Yee and I agreed that we must help the Company out by financing. Previous to this, Yee and I, before we formed the corporation, sold a car on our own, which netted us \$2,000. Yee gave us his personal check for \$3,582.78, which we deposited with the bank at Waipahu, the Bank of Hawaii in Waipahu.

Q. And this deposit ticket represents the deposit of Mr. Yee's personal check? [120]

A. Yes, but that check bounced back.

Q. This check bounced?

A. His personal check bounced.

Q. I will get to that in a minute. You can state positively that the deposit of May 2, 1949, represented the deposit of a personal check of Anthony Yee to the Corporation in the amount of \$3,582.78; that is right, isn't it?

A. That represented part of my money and part of his money.

Q. Part of his money and part of yours?

A. Yes.

Q. But the check was a Yee check?

(Testimony of Takeshi Yokono.)

A. That's right.

Mr. Cades: I offer this in evidence, your Honor.

Mr. Saunders: If your Honor please, I object, first, on the grounds that it is improper to enter it on cross-examination; secondly, it is irrelevant and immaterial; thirdly, it is beyond the scope of the proper cross-examination.

Mr. Cades: If your Honor please——

The Court: Well, I can't see anything to your objection except your claim it is beyond the scope of cross-examination. It is overruled.

The Clerk: Defendant's Exhibit No. 5.

(Thereupon, the document above referred to was received in evidence as Defendant's Exhibit No. 5.) [121]

DEFENDANT'S EXHIBIT No. 5

[Deposit Slip]

Bank of Hawaii

Deposited to Credit of

Waipahu Auto Exchange

May 2, 1949

Subject to Terms Printed Below:

The Bank of Hawaii and the Depositor agree that the provisions of Sections 8096 and 8097, Revised Laws of Hawaii, 1945, or any amendments thereto, apply to all items for deposit accepted by the Bank and that the Bank, in addition, shall be entitled to charge back to the Depositor any item listed on this

(Testimony of Takeshi Yokono.)

deposit slip at any time until such item has been collected. A particular item deposited will be protested only upon receipt of specific instructions.

List Each Check Separately

Silver

Currency

Checks on Following Banks:

Bishop\$3,582.78

[Stamped]: Duplicate 3582.78 Dollars Bank of Hawaii Waipahu Branch S Teller.

Admitted March 16, 1950.

Mr. Cades: Defendant's Exhibit No. 5.

Q. (By Mr. Cades): Now, the check of Anthony Yee bounced, and the bank notified you that the check was no good; isn't that right?

A. That's right.

Q. In the meantime, your account in the Bank of Hawaii had been credited with this payment, had it not? With this deposit, I should have said.

Mr. Saunders: If your Honor please, that question calls for the internal workings of the Waipahu branch of the Bank of Hawaii. It is not up to this witness to testify.

The Court: Yes, that is a presumption that the witness might not have any knowledge of. He could have definite knowledge of the fact.

Mr. Cades: I agree. I think that objection is well taken, your Honor.

(Testimony of Takeshi Yokono.)

Q. (By Mr. Cades): Will you state to the Court what happened after you were notified that the check was no good?

A. Well, after hearing from the Bank that the check bounced, we got in touch with Shintaku, and I went after Yee, and we waited for him till about—we called on him at his home at about 10:30, I guess, and he was home, so we asked him why it was that his check bounced, which we thought that would have been credited to us, and Yee said—

Mr. Saunders: If your Honor please, I object to [122] anything as to what Yee said as being hearsay.

Mr. Cades: Your Honor, that objection is not well taken. The purpose of this testimony is in response to a statement that was made that they purported to operate under these by-laws. I am probing into how they operated under the by-laws; so, your Honor, the \$64 question will be: Is it true that this technical protest of the plaintiff, that we had to have a resolution or something covering all these checks, is so, or is this the kind of behavior that justifies the Bank? That is the sole purpose of the examination.

Mr. Saunders: Your Honor, we are making no such technical claim other than the usual rule, or general rule, that the drawee bank at its peril must identify the payee. If at any time during this five-months period they had made inquiry, they would have found out that Anthony Yee was not authorized to cash these checks. There is nothing

(Testimony of Takeshi Yokono.)

in here that is a technical offense, other than that we are relying on the general rule of law, that the defense of the bank is an affirmative defense. Even if Defendant's Counsel's reason for going into this testimony is correct, it still doesn't justify him in getting hearsay evidence in the record. Anything Anthony Yee said is strictly hearsay and should be overruled, we submit.

The Court: What have you to say as to the hearsay feature? [123]

Mr. Cades: If your Honor please, hearsay testimony is only a valid objection when the truth of what is said in the hearsay is the assertion of that truth. We are not concerned with the truth. What it does is show how the Company operated, which is the \$64 question.

The Court: Well, the explanation then is immaterial. The explanation of the witness as to what he and another member of the association had to say to Mr. Yee about his shortcomings in not making a sufficient deposit of personal funds to take care of the check given to the Bank of Hawaii, drawn on the Bank of Hawaii doesn't seem to be material.

Mr. Cades: Very well. Just avoid saying what Mr. Yee said to you. May we have the answer read.

(Answer read.)

Q. (By Mr. Cades): After the check bounced, didn't the Bank of Hawaii send to you a cashier's draft that had been purchased by Mr. Yee?

A. No.

(Testimony of Takeshi Yokono.)

Q. They didn't? A. I haven't seen it.

Q. Well, in sequence, Mr. Yee's personal check that had bounced was later returned to you by the bank, wasn't it?

A. You mean Yee's personal check?

Q. Yes, the one that had been deposited and bounced was later returned to you, wasn't it—to the Corporation, I [124] mean?

The Court: What was that, a personal check or check of Waipahu Auto Exchange?

Mr. Cades: Your Honor, the item I am referring to is a deposited item as shown on this——

The Court: Yes, I understood that was supposed to be deposited to the account of the credit of the Waipahu Auto Exchange.

Mr. Cades: That is correct, and the item bounced.

The Court: And the Waipahu Auto Exchange drew its check in equal amount in favor of Territorial Motors?

Mr. Cades: That's right.

The Court: And that bounced?

Mr. Cades: No.

The Court: Now Yee made good the check that bounced to the Territorial Motors? That is the way I get the testimony.

Mr. Saunders: I think, if your Honor please, Counsel and I can stipulate as far as it has gone these are the facts: Anthony Yee drew a check to Waipahu Auto Exchange. Waipahu Auto Exchange turned around and drew a check for the amount to Territorial Motors. The check to Territorial Motors

(Testimony of Takeshi Yokono.)

cleared the bank; the check from Anthony Yee to Waipahu Auto Exchange bounced. Will you stipulate that those are the facts?

Mr. Cades: I don't think that is accurate. I think the facts are—It is pretty painful to get out, but my [125] understanding of the facts, your Honor, although I don't want to testify, is that this \$3,582.78 was deposited as Yee's personal check to the account of the corporation. On this basis, the basis of this check, and the fact they thought they had the money in the bank, they drew a check to Territorial Motors, Limited, to pay for some cars. Later it developed that Yee's check was no good and the bank called them and asked them to make good; Anthony Yee made good by depositing in the bank account cashier's check which he purchased from the Bank of Hawaii in order to cover over the \$3582 which was no good in his personal account, thereby making good the check that had been issued to Territorial Motors. I think that is all the facts. If there is any dispute, we will get it out in the long painful way.

Mr. Saunders: We dispute those are the facts. I think these facts are within the knowledge of the defendant, and certainly within the knowledge of Counsel for the defendant, Mr. Kidwell. I think it is clear, and perhaps Mr. Kidwell will stipulate that the Waipahu Auto Exchange check made payable to Territorial Motors was paid by the Waipahu branch of the Bank of Hawaii to Territorial Motors, and that they then made demand on Anthony Yee

(Testimony of Takeshi Yokono.)

to cover his own personal check which had bounced, but that the Waipahu branch did pay the check to Territorial Motors. In other words, the Territorial Motors check cleared without question. The only check that [126] bounced was Anthony Yee's check.

The Court: That doesn't square with the witness' testimony. He said the check bounced and he and another director or stockholder or officer went to Yee's house at 10:30 at night and subsequently Yee made good the deficiency at the bank by a cashier's check.

Mr. Cades: That is correct. Let's ask the witness.

Q. (By Mr. Cades): When this check bounced and was made no good, Yee later made the check good, didn't he? A. Yes.

Q. Do you know how he made it good?

A. I didn't know at that time.

Q. You didn't know at the time, but you did know that he made it good? A. Yes.

Q. You don't know whether he made it good by the deposit of a cashier's check or not?

A. I knew at that time——

The Court: Deposit or purchase of a cashier's check?

Mr. Cades: The "purchase" of a cashier's check would be more accurate.

Mr. Saunders: If your Honor please, all of this is without the possible scope and knowledge of this witness. It all has to do with the Waipahu Auto Exchange and Anthony Yee. There is no showing

(Testimony of Takeshi Yokono.)

he was present at any of this. [127] There is no way he could know this other than hearsay.

Q. (By Mr. Cades): You don't know then?

A. No.

Q. You were looking to Anthony Yee, that is all, to make good? A. Yes.

Q. You were depending on him to make good?

A. That is true.

Q. He was the president of the Company and you knew it had bounced and you were looking to him to make the item good?

A. Well, it was his personal check, so we expected him to make good on that.

Q. Now, just refer one minute again to this purchase of January 20. I am sorry, I have this a little out of turn. I now show you the two invoices for the purchase from Territorial Motors, Limited, one in the amount of \$1934.73—that invoice is No. 10110—the second invoice is numbered 10111 and is in the amount of \$1650.79. I call your attention to the fact that the totals of those two are exactly the total of the cashier's check of January 20, which is \$3585.52, that cashier's check being in evidence—Is this in evidence or identification?

The Clerk: Identification.

Q. (Continuing): Identification as Item No. D. And [128] I will ask you whether, in looking at those, you are not able to say that this cashier's check was in fact the payment that was made for the two cars that were purchased from the Territorial Motors. Can you examine them and see?

(Testimony of Takeshi Yokono.)

Mr. Saunders: Could I see some of these invoices.

Mr. Cades: I will be happy to show them to you. Well, I should have shown them to you ahead of time. I thought you had seen them. I think you did; I handed them to you.

Mr. Saunders: Then I have lost track in the meantime.

Mr. Cades: Just a minute. Let Counsel examine this.

(Handed to Counsel.)

Mr. Saunders: No, I have never seen these.

Q. (By Mr. Cades): Do you understand the question, Mr. Yokono?

A. You want me to identify this as a payment for these two cars?

Q. I want to know whether you are able to from that, plus the books and records of the Company? You weren't able to before.

A. No, this and this is different. This two invoices I know I paid them personally with check from State Savings and Loan Company. I had my cashier's check from State Savings [129] and Loan, and we went to Territorial Motors to pay that.

Q. On January 20, 1949? A. Yes.

Q. Do you have a record as to what the amount of your cashier's check was from the State Building and Loan? A. Not off hand.

Q. You are merely talking from memory now?

(Testimony of Takeshi Yokono.)

A. Yes. Well, through identifying, if that car is one for Saylor and one for Sucalit.

Q. Yes.

A. If that car is one for Sucalit and one for Saylor, I know I went there with \$4,000 cashier's check from State Savings and Loan, as far as I remember, and I don't see why that other check should have been in there as payment for that. I don't understand the check.

Q. Well, isn't this what happened. Didn't you take your cashier's check and endorse it over to Mr. Yee and ask Mr. Yee to go and purchase a cashier's check?

A. No.

Q. You didn't do that?

A. We went direct to Territorial Motors and I paid to the sales manager there.

Q. Did the Territorial Motors then give you cash in return?

A. Yes. [130]

Q. Cash?

A. No. No, it was a check.

Q. You mean Territorial Motors then gave you a check?

A. Yes.

Q. In return?

A. For the balance.

Q. What happened to that check?

A. That is my own money so I took it for my own personal use.

Q. None of that is reflected on any of the corporation records as far as you know?

A. Well, it is on this deposit that we have the first initial deposit. The sales from that cars are in here.

Q. I am not talking about the sales of the car.

(Testimony of Takeshi Yokono.)

I am talking about the fact that you say you personally went down and paid Territorial Motors \$3585.52 and that they gave you a check back for the difference between that and \$4,000; is that right?

A. That is how I recall it.

Q. Did the \$3585.52 ever go through the Waipahu Auto Exchange bank account? A. No.

Q. Did it ever go through the cash receipts book?

A. You mean that cashier's check there? [131]

Q. The amount that you paid for this car. That would be a receipt by the Waipahu Auto Exchange, would it not? A. Yes.

Q. Well, was it ever recorded as a cash received by Waipahu Auto Exchange?

A. I couldn't see it in here.

Q. And you are sure this was not some personal arrangement that you and Anthony Yee had, some kind of a personal arrangement between the two of you whereby you turned money over to Yee and he bought the draft? You are sure that is not true?

A. No.

Q. You deny that? A. Yes.

Q. Now, you were sitting in the court room when the testimony was given by Mr. Lee that the corporation acted as though these were the by-laws, and by "these" I refer to Exhibit No. 1, for identification. You heard that? A. Yes.

Q. All right. Now, referring to these purported by-laws, did you ever read these by-laws?

A. Yes.

Q. How many times? Once? Twice?

A. Once.

(Testimony of Takeshi Yokono.)

Q. Once. Just at the time you signed them?

A. Yes.

Q. Then you never saw them again after that, did you?

A. You mean read through it? No.

Q. Never read them again? A. No.

Q. You heard Mr. Lee testify that he was not notified and never attended any of the meeting?

A. Yes.

Q. Did the Company ever appoint a substitute director, do you know?

A. What is a substitute director?

Q. Do you know what a substitute director is?

A. No.

Q. There is a provision in here that you read once about there being a substitute director, but as far as your knowledge goes, there was no substitute director ever appointed for Mr. Lee?

A. No.

Mr. Cades: We have no further questions.

Mr. Saunders: If your Honor please, could we have a recess.

The Court: Yes.

(Recess had.)

Mr. Saunders: We have no further questions of this witness, your Honor. [133]

The Court: All right, you are excused.

(Witness excused.)

Mr. Saunders: At this time, if your Honor please, by stipulation of Counsel for the defendant and plaintiff, we would like to introduce in evidence the bank statements of Waipahu Auto Exchange, Limited, in the Waipahu branch of the Bank of Hawaii for the months January through May, 1949.

The Court: Bank of Hawaii?

Mr. Saunders: Waipahu branch.

The Court: Bank statements?

Mr. Saunders: For the months, inclusive, January through May, 1949.

Counsel for the defendant seems to want January through November. We have no objection to that.

The Court: Through when?

Mr. Saunders: Through November, 1949.

The Court: All right, they may be received in evidence.

The Clerk: Plaintiff's Exhibits D-1 to D-11, inclusive.

(Thereupon, the documents above referred to were received in evidence as Plaintiff's Exhibits D-1 to D-11, inclusive.)

Bank of Hawaii

Waipahu Auto Exchange, Ltd.

P. O. Box 380

Waipahu, Oahu, T. H.

Statement of your account to close of business May 31, 1949

Old Balance	Checks in Detail	Balance Brought Forward	Date	Deposits	Date	Balance
1,009.28	May 2 '49	3,582.78—	May 2 '49		Apr 30 '49	1,009.28
1,009.28	May 5 '49	19.42—	24.27—	3,582.78	May 2 '49	1,009.28*
	May 5 '49	19.79—	May 5 '49		May 5 '49	939.50*
939.50	May 5 '49	66.15—	May 5 '49		May 5 '49	873.35*
873.35	May 5 '49	250.00—	May 5 '49		May 5 '49	623.35*
623.35	May 6 '49	4.74—	May 6 '49		May 6 '49	618.61*
618.61	May 10 '49	29.83—	May 10 '49		May 10 '49	588.78*
588.78	May 16 SC	1.50—	May 16 SC		May 16 SC	587.28*
587.28	May 17 '49	80.75—	May 17 '49		May 17 '49	506.53*
506.53	May 23 '49	168.10—	May 23 '49		May 23 '49	338.43*
338.43	May 25 '49	38.54—	May 25 '49		May 25 '49	299.89*
299.89	May 27 '49	50.78—	May 27 '49		May 27 '49	249.11*
#73	40.00	249.11				
78	3.30	146.01				
79	33.44					
80	3.11	103.10				
81	7.63					
82	58.53					
		146.01				

[Figures shown in italics appeared in pencil on original.]



BANK OF HAWAII

FOR DEPOSIT WITH
BISHOP NATIONAL BANK OF HAWAII
AT HONOLULU
TO THE CREDIT OF
TERRITORIAL MOTORS, LTD.

TERRESTRIAL MOTORS, LTD.

Three thousand and four hundred Eighty two & 20/100

CO-INITIALS

W. F. H. Shintake

VICE PRESIDENT

W. F. H. Shintake

TREASURER

WAIPAHU AUTO EXCHANGE, LTD.

DOLLARS

3.75

BANK OF HAWAII

FOR DEPOSIT WITH

BISHOP NATIONAL BANK OF HAWAII

AT HONOLULU

TO THE CREDIT OF

TERRITORIAL MOTORS, LTD.

PAY TO THE ORDER OF

ANY BANK, BANKER, TRUST CO.

ALL PRIOR ENDORSEMENTS GUARANTEED

APR 30 1939

BISHOP NATIONAL BANK OF HAWAII

59-101 AT HONOLULU 59-101

Pl. D-5

Mr. Saunders: And the canceled checks are included in that.

The Court: One to eleven? [134]

The Clerk: Yes, your Honor.

The Court: You say the canceled checks are included?

Mr. Saunders: With each statement.

The Court: Yes.

Mr. Saunders: That is the case for plaintiff, your Honor. We rest.

Mr. Cades: If your Honor please, at this time we move——

The Court: Just a minute. Is there anything that you wanted to call the Court's attention to in this last exhibit? You know, just dumping something like that in the Court's lap—maybe there are things in there I ought to know.

Mr. Saunders: The month of May, 1949, your Honor, the statement for that month shows a deposit in the bank, that is the deposit to the account of Waipahu Auto Exchange on May 2, 1949, of \$3582.78, which is a figure that has been alluded to here as being the same figure as the amount of Anthony Yee's check and the amount of the check to Territorial Motors.

The Court: There is credit given for the check?

Mr. Saunders: And no overdraft shown, your Honor. We submit that that indicates that Anthony Yee was extended credit by the bank at Waipahu as not showing any overdraft against the account of Waipahu Auto Exchange, and therefore Anthony Yee, when he purchased the bank draft from the

Bank of [135] Hawaii, was covering his own check.

The Court: The witness testified the check bounced. That could be true, of course, and Yee made it good right then.

Mr. Saunders: Yee made arrangements with the Bank of Hawaii to make it good.

The Court: All right.

Mr. Saunders: We further would like to call the Court's attention to the fact that all checks in this exhibit, which include all checks drawn by Waipahu Auto Exchange during the period in question, were countersigned. They were signed Waipahu Auto Exchange, Limited, by Takeshi Yokono, treasurer, and countersigned by F. H. Shintaku, vice president. That is the substance of each check.

The Court: Yes.

Mr. Saunders: In each case they are countersigned.

The Court: That was assumedly an arrangement made with the bank that that was the form of signature.

Mr. Saunders: For the Corporation.

The Court: For withdrawal of money from the bank.

Mr. Saunders: And every single one of these checks, if your Honor please, was so signed.

Mr. Cades: If your Honor please, we at this time move for a judgment of the Court of the dismissal of this action pursuant to the rule. On the evidence that has been [136] adduced, far from there being any showing made that the Bank has improperly paid checks, the showing goes to show

the affirmative proof that during the—I don't want to make my argument. I would rather make my motion first and then I will argue. First, there is affirmative evidence that Yee was president of the Corporation during all the period of the withdrawal of the funds.

The Court: What is your motion, to dismiss or motion for judgment for defendant?

Mr. Cades: My motion is for judgment for the defendant upon the evidence adduced.

The Court: Go ahead.

Mr. Cades: It is on the ground that it affirmatively appears that the checks which form the basis of this action were all cashed by Yee in his capacity as president of the Corporation, and it affirmatively appears that he was president of the Corporation during that period.

Secondly, it affirmatively appears that the cashing by Anthony Yee was satisfactory to the plaintiff, because by their action in cashing a check similarly endorsed they ratified and confirmed and approved the action of their bank in paying checks payable to Waipahu Auto Exchange by making the cash payment to Anthony Yee as president.

The third ground of our motion is that it affirmatively appears from the conduct of the Corporation and the manner [137] in which its officers attended to their business that the Corporation itself looked to Yee as president for all of the financing arrangements, and that the treasurer took whatever orders or instructions—he looked to Yee for information as to advice as to financing. And under those cir-

cumstances the plaintiff has failed to prove the allegation of its amended complaint, which is that Anthony Yee cashed the checks without any right, authority, or permission; and that because of such failure of proof the defendants are entitled to judgment.

We are prepared to go ahead and argue the motion, your Honor, if your Honor wants to hear it at this time.

The Court: Well, better argue it.

(Argument on motion by Counsel.)

The Court: My view is that payment was made to the payee of the checks of the plaintiff to an authorized agent to receive payment. The testimony shows, through the treasurer's testimony, that Yee was authorized; if not specifically commissioned, it was generally known by the officers of the Company that he was to make financial arrangements with the plaintiff in the case, and he is the one who was dealing with the plaintiff in the case as the one authorized so to do by the Waipahu Auto Exchange. And when he was introduced—it doesn't show by whom—to the Bishop Bank, upon which the checks were drawn, as being the president of the Corporation [138] of which he had possession of the checks and asserted that he had authority to receive the payment of the check for the Waipahu Auto Exchange, I can't see that any liability attached to the defendant in paying the checks to the order of the Waipahu Auto Exchange, endorsed by its president.

I find the defendant without liability in the case

and render judgment for the defendant.

Mr. Cades: If your Honor please, may we submit the findings of fact for the signature of the Court pursuant to the rule.

The Court: Yes, you prepare findings of fact and submit a copy to the plaintiff. I wish them to have every right of objection and exception to the proceedings and findings of the Court and the judgment, and the form of judgment as well. And if Counsel for the Plaintiff has any objection to the findings of fact prepared by defendant, or wants to add anything, he can bring it to the Court at some point of time.

(Thereupon, at 3:50 p.m., March 16, 1950, the hearing was adjourned.) [139]

CERTIFICATE

I, Lucille Hallam, Official Reporter, U. S. District Court, Honolulu, T. H., do hereby certify that the foregoing is a true and correct transcript of my shorthand notes taken in Civil No. 947, Federal Services Finance Corporation, etc., Plaintiff, vs. Bishop National Bank of Hawaii at Honolulu, etc., Defendant, held March 15 and 16, 1950, before Hon. Delbert E. Metzger, Judge.

April 20, 1950.

/s/ LUCILLE HALLAM.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD
ON APPEAL

United States of America,
District of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing record on appeal in the above-entitled cause, consists of the following listed pleadings, minutes of the court, transcript of proceedings, and exhibits of record in said cause:

Original Pleadings

Answer of Bishop National Bank of Hawaii at
Honolulu

Findings of Fact and Conclusions of Law
Judgment

Notice of Appeal and Bond on Appeal

Order Extending Time to File the Record on
Appeal

Copies of Pleadings

Complaint and Summons

Amended Complaint and Summons

Stipulation Abridging Record to be Printed

Stipulation as to Record on Appeal

Minutes of the Court

March 15, 1950

March 16, 1950

Transcript of Proceedings

March 15 and 16, 1950

Exhibits

Plaintiff's Exhibits "B-1" to "B-12," inclusive,
"C," and "D-1" to "D-11," inclusive

Plaintiff's No. 1 for identification

Defendant's Exhibits Nos. 1, 2, and 2-A, 3, 4-A
and 4-B, and 5

Defendant's "C" and "D" for identification

I further certify that all copies of pleadings included in this record on appeal are true and correct copies of the originals on file in this court.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 1st day of September, 1950.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, United States District Court, District of
Hawaii.

[Endorsed]: No. 12678. United States Court of Appeals for the Ninth Circuit. Federal Services Finance Corporation, a Corporation, Appellant, vs. Bishop National Bank of Hawaii at Honolulu, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Territory of Hawaii.

Filed September 8, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals

For the Ninth Circuit

No. 12678

FEDERAL SERVICES FINANCE CORPORATION, a Delaware Corporation,

Appellant,

vs.

BISHOP NATIONAL BANK OF HAWAII AT HONOLULU, a National Banking Association, Appellee.

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL

The points upon which Federal Services Finance Corporation, Plaintiff and Appellant in the above-entitled cause, intends to rely on this appeal are as follows:

1. The District Court erred in denying the offer in evidence by Appellant of the By-Laws of the Waipahu Auto Exchange, Limited, being its Exhibit No. 1 for identification.

2. The District Court erred in allowing counsel for Defendant, over objection of counsel for Plaintiff, to cross-examine the witness Yokono concerning the authority of Anthony Yee in regard to the management of the affairs of Waipahu Auto Exchange, Limited, said cross-examination not being within the scope of the direct examination.

3. The District Court erred in finding in paragraph 6 of the Findings of Fact that Anthony Yee "as such President endorsed and cashed said checks."

4. The District Court erred in finding in paragraph 7 and paragraph 8 of the Findings of Fact that Anthony Yee was acting in his capacity as President of Waipahu Auto Exchange, Limited, in presenting for payment and cashing the checks listed therein.

5. The District Court erred in finding in paragraph 9 of the Findings of Fact that Anthony Yee was acting in his capacity as President of Waipahu Auto Exchange, Limited, in presenting and cashing the check described therein.

6. The District Court erred in finding in paragraph 12 of the Findings of Fact that "The deposit by the Plaintiff of a check cashed for the corporation by Anthony Yee constituted a representation

to the Bank that Anthony Yee was authorized to cash checks.”

7. The District Court erred in finding in paragraphs 13 of the Findings of Fact that “The Treasurer was relying upon the President for the financial operations of Waipahu Auto Exchange, Limited.”

8. The District Court erred in concluding that by virtue of his office as President of Waipahu Auto Exchange, Limited, Anthony Yee had prima facie authority to endorse negotiable paper and receive payment thereon on behalf of said corporation.

9. The District Court erred in concluding that the acts of officers and directors of Waipahu Auto Exchange, Limited in permitting the President to make certain financial arrangements for said corporation, impliedly authorized the President, Anthony Yee, to endorse the checks in question and receive payment therefor on behalf of said corporation.

10. The District Court erred in concluding that the President, Anthony Yee, had apparent authority to endorse the checks in question and receive payment therefor on behalf of said corporation.

11. The District Court erred in concluding that the Plaintiff had wholly failed to prove the allegation No. 5 of its Complaint, viz:

“On or about the respective dates of said checks one Anthony Yee took said checks and wrongfully, and without any right, authority or permission, endorsed each thereof in blank with the name of the payee named therein.”

12. The District Court erred in concluding that each of said checks had been paid in accordance with the terms thereof.

13. The District Court erred in dismissing the action upon its merits and rendering judgment in favor of the Defendant.

Dated: Honolulu, Hawaii, this 30th day of August, 1950.

FEDERAL SERVICES
FINANCE CORPORATION,
Appellant.

By /s/ WILLIAM W. SAUNDERS,

By /s/ EDWARD Z. BUCK,

Its Attorneys.

Receipt of Copy Acknowledged.

[Endorsed]: Filed September 8, 1950.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF PORTIONS OF RECORD TO BE PRINTED

Federal Services Finance Corporation, Appellant in the above-entitled cause, hereby designates for printing the following portions of the record on appeal:

(1) Complaint.

(2) Defendant's Answer to Complaint.

- (3) The Amended Complaint.
- (4) Transcript of Proceedings.
- (5) The following exhibits or parts thereof:
 - (a) Plaintiff's Exhibits B-1 through B-12, inclusive.
 - (b) Defendant's Exhibit No. 1.
 - (c) The following excerpts from Plaintiff's Exhibit No. 1 for identification. Title of exhibit; Article III, Sections 3, 4 and 5, Pages 4-6; Article IV, Sections 1, 2, 3, 4, 5 and 6, Pages 6-8; Article V, Pages 8-9; Article IX, to end of document, last page.
 - (d) The following excerpts from Plaintiff's Exhibit C: Certification and Flyleaf; First Page, through Articles I and II; Article VII, to bottom of Page 9; all of Page 10; all of the last two pages of the exhibit, being the Affidavit of Anthony Yee, Kay Y. K. Pang and Takeshi Yokono.
 - (e) The following excerpts from Plaintiff's Exhibit D-5: All entries on the statement for May, 1949, the cancelled check dated April 29, 1949, included therewith, but excluding other checks.
- (6) Findings of Fact and Conclusions of Law.
- (7) Judgment.
- (8) Notice of Appeal and Bond on Appeal.

(9) Order Extending Time to File the Record on Appeal.

(10) Stipulation abridging record to be printed.

(11) Statement of Points upon which Appellant intends to rely on appeal.

(12) This Designation.

Dated: Honolulu, Hawaii, this 30th day of August, 1950.

FEDERAL SERVICES
FINANCE CORPORATION,
Appellant.

By /s/ WILLIAM W. SAUNDERS,

By /s/ EDWARD Z. BUCK,

Its Attorneys.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 8, 1950.

[Title of Court of Appeals and Cause.]

COUNTER DESIGNATION OF PORTION
OF RECORD TO BE PRINTED

Bishop National Bank of Hawaii at Honolulu, Appellee in the above-entitled cause, hereby designates for printing, in addition to the portion designated in Appellant's designation served on the Appellee on August 30, 1950, the following portions of the record on appeal:

- (1) Defendant's Exhibit No. 2 (both the face and the reverse side);
- (2) Defendant's Exhibit No. 2a;
- (3) Defendant's Exhibit No. 5;
- (4) Defendant's Exhibit C for identification;
- (5) Defendant's Exhibit D for identification;
- (6) This Counter Designation.

Dated: Honolulu, Hawaii, this 31st day of August, 1950.

BISHOP NATIONAL BANK OF
HAWAII AT HONOLULU,
Appellee.

By /s/ J. RUSSELL CADES,
Its Attorney.

SMITH, WILD, BEEBE & CADES, ANDERSON,
WRENN & JENKS,
Of Counsel.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 8, 1950.

No. 12678

United States
Court of Appeals
For the Ninth Circuit.

FEDERAL SERVICES FINANCE CORPORA-
TION, a Corporation,

Appellant,

vs.

BISHOP NATIONAL BANK OF HAWAII AT
HONOLULU, a Corporation,

Appellee.

SUPPLEMENTAL
Transcript of Record

Appeal from the United States District Court,
for the Territory of Hawaii.

FILED
JAN 3 1951

J. P. O'BRIEN,
CLERK



No. 12678

**United States
Court of Appeals
For the Ninth Circuit.**

FEDERAL SERVICES FINANCE CORPORATION, a Corporation,

Appellant,

vs.

**BISHOP NATIONAL BANK OF HAWAII AT
HONOLULU, a Corporation,**

Appellee.

**SUPPLEMENTAL
Transcript of Record**

**Appeal from the United States District Court,
for the Territory of Hawaii.**



In the United States District Court
for the District of Hawaii

Civil No. 947

FEDERAL SERVICES FINANCE CORPORATION, a Delaware Corporation,

Plaintiff,

vs.

BISHOP NATIONAL BANK OF HAWAII AT
HONOLULU, a National Banking Association,
Defendant.

MOTION FOR NEW TRIAL

Comes now the plaintiff in the above-entitled action and moves the Court to set aside and vacate the judgment of the Court in this action, and grant a new trial for the following reasons:

- (1) Errors of law occurring at the trial, and objected to by the plaintiff, more specifically:
 - (a) in the rejection of evidence offered by the plaintiff;
 - (b) in the admission of evidence objected to by the plaintiff;
 - (c) in rulings on the law applicable to the case.
- (2) Said judgment is not supported by sufficient evidence, but is contrary to the evidence.

In compliance with Rule 2 (a) (2) of the Rules of Civil Procedure for the United States District Court for the District of Hawaii, there is attached

hereto and made a part hereof Reasons and Citations of Authorities in support of this motion.

Dated: Honolulu, Hawaii, this 19th day of April, 1950.

/s/ WILLIAM W. SAUNDERS,
Attorney for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 19, 1950.

[Title of District Court and Cause.]

ORDER DENYING
MOTION FOR NEW TRIAL

The motion for new trial filed herein April 19, 1950, came on regularly to be heard before the Court on May 19, 1950, and the Court having heard argument of counsel in support and against said motion, and the Court on said date having rendered an oral order denying the granting of said motion, it is hereby

Ordered, Adjudged and Decreed that the said motion for new trial be denied, and that this order shall take effect as of its oral rendition, May 19, 1950.

Dated: Honolulu, Hawaii, this 29 day of November, 1950.

/s/ D. E. METZGER,
Judge of the United States
District Court.

[Endorsed]: Filed November 29, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing supplemental record on appeal in the above-entitled cause, consists of the following listed original pleadings:

Motion for New Trial and Reasons and Citations in Support of Motion for New Trial

Order Denying Motion for New Trial

Stipulation as to Supplemental Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 30th day of November, 1950.

/s/ WM. F. THOMPSON, JR.,

Clerk, United States District
Court, District of Hawaii.

United States Court of Appeals
for the Ninth Circuit

No. 12678

FEDERAL SERVICES FINANCE CORPORA-
TION, a Corporation,

Appellant,

vs.

BISHOP NATIONAL BANK OF HAWAII AT
HONOLULU, a Corporation,

Appellee.

Appeal from the United States District Court,
for the Territory of Hawaii

STIPULATION FOR PORTIONS OF
SUPPLEMENTAL RECORD TO BE PRINTED

It Is Hereby Stipulated by and between counsel
for the respective parties hereto that the following
portions of the supplemental record on appeal be
printed:

1. Motion for New Trial.
2. Order Denying Motion for New Trial.
3. This Stipulation.

Dated: Honolulu, Hawaii, this 1st day of December, 1950.

/s/ WILLIAM W. SAUNDERS,

/s/ EDWARD Z. BUCK,

Attorneys for Appellant.

/s/ J. RUSSELL CADES,

H. BAIRD KIDWELL,

By /s/ JAMES M. RICHARD,

Attorneys for Appellee.

[Endorsed]: Filed December 2, 1950.

[Endorsed]: No. 12678. United States Court of Appeals for the Ninth Circuit. Federal Services Finance Corporation, a Corporation, Appellant, vs. Bishop National Bank of Hawaii at Honolulu, a Corporation, Appellee. Supplemental Record on Appeal. Appeal from the United States District Court for the Territory of Hawaii.

Filed December 2, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

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**United States
Court of Appeals
For the Ninth Circuit.**

FEDERAL SERVICES FINANCE
CORPORATION, a Corporation,

Appellant,

vs.

BISHOP NATIONAL BANK OF HAWAII,
AT HONOLULU, a Corporation,

Appellee.

Appeal from the United States District Court,
For the Territory of Hawaii

**BRIEF FOR APPELLANT
FEDERAL SERVICES FINANCE CORPORATION**

WILLIAM W. SAUNDERS

EDWARD Z. BUCK

Attorneys for Appellant

Federal Services Finance Corporation

Of Counsel:

LEWIS, KIMBALL & BUCK

1160 Bishop Street

Honolulu, T. H.

FILED

JAN - 2 1951

PAUL P. O'BRIEN

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United States Court of Appeals
For the Ninth Circuit.

FEDERAL SERVICES FINANCE
CORPORATION, a Corporation,

Appellant,

vs.

BISHOP NATIONAL BANK OF HAWAII,
AT HONOLULU, a Corporation,

Appellee,

Appeal from the United States District Court,
For the Territory of Hawaii

BRIEF FOR APPELLANT

JURISDICTION

Pursuant to Title 28, U.S.C. sec. 1332 (a) (1) and (b), there was presented to the District Court in Hawaii a suit by appellant, a Delaware corporation, against appellee, a national banking association located in the Territory of Hawaii, involving a matter in controversy exceeding \$3,000.00, exclusive of interest and costs. These facts are pleaded in the amended complaint, paragraph I (R. 14). These jurisdictional facts were admitted in appellee's answer, paragraph I in its Second Defense (R. 6), and by oral stipulation of counsel for appellee (R. 39).

Judgment in favor of appellee was entered April 10, 1950 (R. 26). Appellant, pursuant to Rule 59 of Title 28, U.S.C., Federal Rules of Civil Procedure for District Courts, filed a motion for a new trial on April 19, 1950

(Sup. R. 209-210). Said motion was denied on May 19, 1950 (Sup. R. 210). Pursuant to Title 28, U.S.C., sec. 1291 and sec. 1294 (1), appellant noted and perfected its appeal to this Court (R. 27). This appeal was filed on June 16, 1950, which was within thirty days, as required by Rule 73 (a) of said Federal Rules of Civil Procedure.

STATEMENT OF FACTS

This case is a suit by appellant, a depositor, against appellee, the drawee-bank, seeking to recover \$17,726.00, representing the total of the sums paid out by appellee bank and charged to appellant's account on twelve (12) checks drawn by appellant during January through May, 1949. Appellant's contention is that each of the twelve checks was not paid according to its terms, to-wit: to the named corporate payee, or its order.

At the trial the following evidence was adduced:

A. THE EVIDENCE (ALL UNDISPUTED) CONCERNING THE CHECK CASHING.

Appellant was a depositor in the appellee bank, having at all pertinent times sufficient funds on deposit in appellee bank to cover all checks drawn by appellant on appellee bank, including the twelve checks now the subject of this case (R. 40).

During the months of January, 1949, through May, 1949, the twelve checks in question were drawn by appellant, each one being made payable to the order of Waipahu Auto Exchange, Ltd. (R. 53-64, plaintiff's Exhibits B-1 to B-12, inclusive), a corporation organized under the laws of the Territory of Hawaii (R. 6, 9, 40).¹

¹ Fourteen (14) checks in all were drawn payable to Waipahu Auto Exchange, Ltd., during this period (R. 51). The two checks not here concerned are dated February 2, 1949, and May 9, 1949. The February 2nd check was endorsed "For deposit, Waipahu Auto Exchange, Ltd., By F. H. Shintaku," and paid to the Bank of Hawaii, Waipahu Branch (R. 68, admitted in Evid. R. 67). The May 9th check was cashed in the office of the appellant cor-

Each of the twelve checks was endorsed substantially "Waipahu Auto Exchange, Ltd., By Anthony Yee, President" (R. 53-64, admitted, R. 51).²

The clear inference to be drawn from an examination of each check (R. 53-64), coupled with the appellee's answer (R. 6-9) and oral admissions (R. 42), is that in each instance Anthony Yee was paid cash on presentation of the checks, and the trial court so found (R. 20-21). Nine of the checks were cashed by Anthony Yee at the appellee bank, the other three were cashed at the Bank of Hawaii, which bank endorsed these checks to the appellee, appellee, in turn, cancelling them and charging the amounts thereof against the account of the appellant. Although Anthony Yee was then President of Waipahu Auto Exchange, Limited (R. 96), there is no evidence in the record that he was expressly authorized to cash corporate checks or that the cash received was ever paid to the corporation.

When bank statements by the appellee bank were submitted to the appellant monthly, they were examined for the purposes of reconciling the bank account. It was not the custom, prior to the "Yee incident" for the appellant corporation in examining the bank statements to do more than reconcile the bank account by comparing its record of the amounts of the checks drawn against the amounts shown in the bank statement. Prior to the "Yee incident" the endorsements were not examined (R. 78-80).

Prior to the commencement of this suit, appellant tendered to appellee each of the twelve checks and demanded repayment of the total sum of \$17,726.00 (R. 43). Demand was refused (R. 44), and this suit instituted.

corporation by one of the corporation's employees and the money paid to Anthony Yee, President of Waipahu Auto Exchange, Ltd., following which the check was deposited to appellant's account (R. 69-78, 83).

² One endorsement omitted the word "Ltd.," and one endorsement omitted the word "By." Four of the checks spelled out the word "Exchange," and eight others abbreviated it "Ex" (R. 53-64).

B. ADOPTION OF THE BY-LAWS AND THE INCORPORATION OF WAIPAHU AUTO EXCHANGE, LIMITED, THE NAMED PAYEE.

Herbert K. H. Lee, a Honolulu attorney, was consulted by Anthony Yee (characterized by Mr. Lee as the "prime mover in this organization") about organizing a corporation called the "Waipahu Auto Exchange" (R. 109). The record discloses only four initial incorporators and stockholders: Anthony Yee, Fred H. Shintaku, Kay Y. K. Pang and Takeshi Yokono (R. 90, 122, 107). Mr. Lee drew up the Articles of Incorporation and the By-Laws (R. 109), but overlooking the fact that Hawaii statutory laws require five incorporators, he prepared spaces for only the four signatures on each document (R. 110, 111). In order to save the incorporators a trip to Honolulu, the documents were turned over to Anthony Yee to have executed at the shop office located at Waipahu, a distance of about twenty miles from attorney Lee's office (R. 109, 132-133). On November 13, 1948 (R. 87), Anthony Yee called a meeting of the four stockholders-incorporators at the shop office, these four being the same four listed earlier: himself, Fred Shintaku, Kay Pang and Takeshi Yokono (R. 89). Yee produced the By-Laws and Articles of Incorporation which were read through; several points were discussed and the papers were signed. No minutes were taken at the meeting (R. 86-90).

The By-Laws and Articles of Incorporation were returned to lawyer Lee, signed by the four initial stockholders and the original four incorporators. The Articles were filed with the Territorial Treasurer's Office on November 27, 1948 (R. 109-110, 103) (By-Laws do not need to be filed under Territorial law). However, because the Articles contained the signatures of only four incorporators, they were returned to attorney Lee's office (R. 111). So lawyer Lee was asked to be a dummy director and dummy

incorporator to comply with the statute requiring five incorporators (R. 111). Lee added his name to the list of directors and incorporators (R. 104-105) and the Articles were refiled on December 7, 1948 (R. 103). Lawyer Lee was not a stockholder (R. 127), and throughout the life of the corporation did not attend directors or stockholders meetings (R. 131).

Although lawyer Lee did not sign the purported By-Laws, he testified that during this procedure of incorporation, prior to the filing of the Articles of Incorporation, he drew up the By-Laws and by implication approved them (R. 111). He identified the executed By-Laws (R. 111-123) as being the original, and stated that it had been kept in his files as the functional By-Laws at all times until asked for by appellant's attorney (R. 122, 127).

Takeshi Yokono testified that the document contained the By-Laws under which the corporation acted (R. 88).

Despite the foregoing evidence, the By-Laws were not admitted in evidence, the Court ruling "In the absence of any meeting of stockholders or directors with relation to these purported By-Laws, the offer is denied at the present time" (R. 136).

C. THE TESTIMONY OF TAKESHI YOKONO.

Appellant called the witness Takeshi Yokono and only questioned him on the limited issue of the execution and authenticity of the purported By-Laws of Waipahu Auto Exchange (R. 85-88). Although the cited pages contain the sole testimony adduced from this witness by appellant, over objection by appellant the trial court allowed the cross-examination to continue over wide fields for 55 pages, not including exhibits (also admitted into evidence over objection) (R. 94-101, 136-165, 172-175, 177-189). During this cross-examination the following developed:

The witness Yokono was treasurer of Waipahu Auto Exchange (R. 96), but he never drew any salary since he

had a full-time job running a general store (R. 139-140). He would put in a limited amount of time from day to day as it was needed (R. 140). As a part of his duties as treasurer he would attend to the making of deposits in the bank for Waipahu Auto Exchange (R. 145).

Shintaku was the general manager (R. 97), and vice president of the corporation (R. 105), was a full-time employee, and was in charge of the Waipahu Auto Exchange office (although the dates during which he was a full-time employee are not shown (R. 141)).

Anthony Yee was the president until about June or July, 1949, of Waipahu Auto Exchange (R. 94, 148-149), but he did not act as general manager (R. 97). He was the presiding officer and presided over the November 23rd meeting (at which the By-Laws and Articles of Incorporation were executed), held at the shop office, and over all directors meetings (R. 98). Yee dealt with finance companies with Yokono's sanction (R. 97, 161). There is no record of any resolution relating to dealings with the appellant corporation. Yokono depended upon Yee for the making of arrangements and the carrying out of arrangements that existed with respect to the assignment of conditional sales contracts to the appellant finance company, and Yokono had no personal knowledge thereof except what he had understood from Yee (R. 98-100).

The secretary was Kay Y. K. Pang, a relative of Yee, but she was an inactive secretary and did not know what the corporation was doing. She did not sign any papers as secretary, nor did she keep any records of meetings or of any corporate transactions. She was not able to do the work as secretary, and she asked the others to do her work for her (R. 105, 141-142).

Regarding the keeping of the books, Yokono kept what he characterized as the "datas," but the corporation journal and ledger were not written out until June or July, 1949 (after the Yee defalcation was discovered) (R. 148).

It is to be noted that the corporation maintained an account in the Bank of Hawaii, Waipahu Branch, and all of the checks drawn by the corporation on that account were signed "Waipahu Auto Exchange, Limited, by T. Yokono, Treasurer," and countersigned "F. H. Shintaku, Vice President" (R. 29-30).

QUESTIONS INVOLVED

1. Did Anthony Yee, president of Waipahu Auto Exchange, Limited, possess authority, inherent, implied or apparent, to endorse and cash twelve checks made payable to the corporation?
2. Did the trial court err in excluding from evidence the purported By-Laws of the Waipahu Auto Exchange, Limited, the corporate payee named in the twelve checks?
3. Did the trial court err in allowing a general cross-examination of the witness Takeshi Yokono, examined on direct on the limited issues of the execution and authenticity of the By-Laws of Waipahu Auto Exchange, Limited?

SPECIFICATION OF ERRORS

The District Court in Hawaii is in error in this case in that:

1. The Court erred in denying the offer in evidence by appellant of the By-Laws of the Waipahu Auto Exchange, Limited, being Plaintiff's Exhibit No. 1 for Identification, relevant portions of which are printed in the Record (R. 111-122). Pertinent parts of the By-Laws are quoted as follows:

Article IV, Section 3 (R. 116):

"Section 3. The President. The President shall preside at all meetings of stockholders; and in case no Chairman of the Board of Directors is appointed, or in the absence of such a Chairman, if appointed, he shall preside at meetings of the Board of Directors.

He shall exercise general supervision over the business of the corporation and over its several officers, agents and employees, subject, however, to the control of the Board of Directors."

Article IV, Section 5 (R. 117) :

"Section 5. The Treasurer. The Treasurer shall have custody of all the funds, notes, bonds and other evidences of property of the corporation, and shall be responsible for keeping all the books and accounts of the corporation, and shall render statements thereof in such form and as often as required by the Board of Directors. He shall be responsible for the keeping of the stock books, stock transfer books, and stock ledger of the corporation. The Treasurer shall perform all other duties assigned to him by the President or the Board of Directors."

Article V (R. 118) :

"Article V.

Execution of Instruments

Section 1. Proper Officers. Except as otherwise provided by these by-laws or by law, all checks, drafts, notes, bonds, acceptances, deeds, leases, contracts, and all other documents and instruments, shall be signed, executed and delivered by the President or a Vice-President and by the Treasurer or the Secretary; provided, however, that the Board of Directors may from time to time by resolution authorize checks, drafts, bills of exchange, notes, orders for the payment of money, licenses, endorsements, stock powers, powers of attorney; proxies, waivers, consents, returns, reports, applications, notices, agreements or documents, instruments or writings of any nature to be signed, executed and delivered by such officers, agents or employees of the corporation, or any one of them, in such manner as may be determined by the Board of Directors."

The foundation for the offer of the Exhibit was made by the testimony of Mr. Herbert K. H. Lee (R. pp. 101-102, 108-127), plaintiff's Exhibit C, being a certified copy of the Articles of Incorporation of Waipahu Auto Exchange, Limited, excerpts of which are in the Record (pp. 102-108), and the testimony of Takeshi Yokono (R. 86-91). The By-Laws were offered in evidence by plaintiff in the following words:

"If your Honor please, I make a second offer of proof of Plaintiff's Exhibit 1, for identification and ask that these be received in evidence, based upon a foundation's having been laid in the testimony of Mr. Lee and Mr. Yokono" (R. 127).

The offer in evidence was objected to by appellee in the following language:

"I object to the admissibility of these as the proposed by-laws of the corporation on the grounds that there has been no compliance shown with the statutes of the Territory, without admitting that even if they were by-laws that it would have any bearing on the authority which will ultimately be decided. I think that the admissibility of these records would merely further clutter up the confusion as to who had authority to act" (R. 131-132).

Additional evidence was adduced through Mr. Lee prior to the trial court's ruling (R. 127-133). Appellant stated its grounds for urging the admissibility of the By-Laws (R. 133-134, and again 135). Appellee restated its objection (R. 134-135):

"In order that our objection may be complete on the record, we object to the admissibility of these by-laws, first, because it affirmatively appears that they were not adopted by the corporation in accordance with the provisions of law and in fact are not by-laws; secondly, and equally important, because there has been no showing made — The statute providing that

there is no constructive notice of the by-laws on outsiders, there is no showing made that we had or could have obtained actual notice of the by-laws; next, on the ground that it appears from the evidence that has been adduced so far that even the statutory requirement of having a certified copy available, certified by the secretary and available for examination by the stockholders, which appears in this same section, was not complied with; next, on the ground that the only testimony that they acted as though these were the by-laws is a statement by the attorney that he assumed they were the by-laws because he had them in the file all during the existence of the corporation.

"Since the movant has the affirmative burden of showing that this document either is the by-laws effective or that we had notice that they were by-laws and that there were limitations brought home to us, the document is not admissible. For all these grounds we urge your Honor not to admit the document in evidence."

The court ruled (R. 136) :

"In the absence of any meetings of either stockholders or directors with relation to these purported by-laws the offer is denied at the present time.

"Mr. Saunders: If your Honor please, if I may call your attention to the testimony of Mr. Yokono yesterday, he said they had a meeting and all four of them read the articles and by-laws at that time and signed them. He further stated that these were the by-laws under which the corporation acted. With that in mind, I ask your Honor to reconsider your ruling.

"The Court: No, the ruling stands."

2. The Court erred in allowing counsel for defendant-appellee, over objection of counsel for plaintiff-appellant, to cross-examine the witness Yokono concerning the authority of Anthony Yee in regard to the management of the affairs of Waipahu Auto Exchange, Limited, said cross-examination not being within the scope of the direct exam-

ination. The entire direct examination of witness Yokono, including objections, covered only three full pages of the record, and embraced merely the execution and authenticity of the purported By-Laws (R. 85-88). Despite objections as set out below, appellee was permitted to conduct a lengthy cross-examination covering 56 pages of the printed record (R. 94-101, 136-165, 172-189), the full substance of which tended to show that the Waipahu Auto Exchange, Limited, was an informally operated corporation; that no formal resolutions were adopted relating to the conduct of said corporation's business with plaintiff-appellant; that Anthony Yee, President of said corporation, with the sanction of witness Yokono, established and carried out the business arrangements of Waipahu Auto Exchange, Limited, with plaintiff-appellant; that the officers and directors of Waipahu Auto Exchange, Limited, permitted Anthony Yee, president of said corporation, to act in its behalf with finance companies without formal authorization therefor; that the corporate books and records of Waipahu Auto Exchange, Limited, were not complete and accurate; and that there were additional personal transactions between Yee, Yokono and others affecting said corporation.

Appellant objected numerous times to the fact that appellee was conducting its cross-examination beyond the scope of the direct examination (R. 94, 96, 97-98, 99, 137-139, 143-144, 146, 149, 153-154, 163-164). For the sake of brevity only certain of the objections will be quoted in order to show that appellant made known to the trial judge the scope of its objections and the reasons therefor.

Record, pages 96-97:

"Q. (By Mr. Cades) : Mr. Yokono, were you treasurer of the Company?

Mr. Saunders: If your Honor please, I object to the question as not being within the scope of the direct examination.

The Court: Overruled."

Record, pages 97-98:

"Mr. Saunders: If your Honor please, I think it is obvious by now to the Court that this is getting very far afield from the subject of (1) the execution of a document purporting to be by-laws, and (2) a discussion, or at least a reference to a meeting in which the by-laws were signed. Now, that was the limits of Mr. Yokono's direct examination, and Counsel is now going very far afield in trying to prove authority by this witness when his direct examination did not encompass authority.

The Court: Overruled."

Record, pages 143-144:

"Mr. Saunders: The only thing that I want to make clear is for the record to show we object to all of the questions that defendant is now asking. We would like to have a continuing objection on the grounds that our direct examination was limited solely to the scope that this witness was called to identify.

The Court: I know you have made that objection two or three times. I don't consider it valid on that basis. Counsel for the defense may ask questions at any time that you would have a perfect right to object to and have a ruling on, but on a general objection I, up until now, can't see anything that justifies a sustaining of the objections. It has been ruled on adversely.

Mr. Saunders: My only point in asking that is that otherwise I am going to have to be a literal 'jack-in-the-box' on every question he asks.

The Court: I don't know that you do, but you have discretion in the matter. I have already ruled on your main proposition, that the witness having been called for a limited special purpose, on cross-examination Counsel can't go outside of that scope. I have already ruled on that and said that he could under the circumstances of the case.

Mr. Saunders: Your Honor said that he could go without the scope?

The Court: Yes, under the circumstances of the case he can inquire as to all matters that he has inquired into."

Record, pages 153-154:

"Mr. Saunders: If your Honor please, we don't like to jump up and down and interrupt the testimony. Would it be possible to allow us a continuing objection to all questions pertaining to the banking procedure which Mr. Cades is about to go into on the grounds that I just asserted?

The Court: Well, I think it has been made sufficiently clear as to what he is going into has just now been recently gone into so that I think I can entertain that as a general objection, and within that particular range I hold that the examination is proper and the objection is overruled. You may have an exception."

Record, pages 163-164:

"Mr. Saunders: If your Honor please, in the meantime could we make it clear that we would like to renew the same objection we made. He has kind of gotten far afield from the banking situation now and is going into car sales and finance arrangements. We would like to make it clear we are objecting to the entire line of testimony now being presented by Counsel for the defense.

The Court: Well, it more or less seems to me to go to the matter as to what this witness, who said he was treasurer of the Company, knows, or knew, about the natural affairs of the Company. I think it is permissible.

Mr. Saunders: Could we clarify one thing first, your Honor. Could we have the reporter check back on her notes, and see whether Mr. Yokono ever stated that he was treasurer. My recollection is that he did not.

The Court: Well, from my angle it doesn't make any difference in the situation whether it was said on direct examination or whether he said it on cross-examination. I am sure that he made the statement that he was, and it was in connection with either the

articles of incorporation, had relation to that, or as to the by-laws, or purported by-laws, whichever one you may choose to refer to those as, and the fact has been submitted on the stand, claimed that he was the treasurer. Examinations as to his knowledge of the financial affairs of the Company are matters of importance."

3. The District Court erred in finding in paragraph 6 of the Findings of Fact that Anthony Yee "as such President endorsed and cashed said checks" (R. 20).

4. The District Court erred in finding in paragraphs 7 and 8 of the Findings of Fact that Anthony Yee was acting in his capacity as President of Waipahu Auto Exchange, Limited, in presenting for payment and cashing checks listed therein (R. 20-21).

5. The District Court erred in finding in paragraph 9 of the Findings of Fact that Anthony Yee was acting in his capacity as President of Waipahu Auto Exchange, Limited, in presenting and cashing checks described therein (R. 22).

6. The District Court erred in finding in paragraph 12 of the Findings of Fact that "the deposit by the Plaintiff of a check cashed for the corporation by Anthony Yee constituted a representation to the bank that Anthony Yee was authorized to cash checks" (R. 23).

7. The District Court erred in making such a broad finding in paragraph 13 of the Findings of Fact that "the Treasurer was relying upon the President for the financial operations of Waipahu Auto Exchange, Limited" (R. 24).

8. The District Court erred in concluding in paragraph 1 of the Conclusions of Law that by virtue of his office as President of Waipahu Auto Exchange, Limited, Anthony Yee had prima facie authority to endorse negotiable paper and receipt payment thereon on behalf of said corporation (R. 24).

9. The District Court erred in concluding in paragraph 2 of the Conclusions of Law that the acts of officers and directors of Waipahu Auto Exchange, Limited, in per-

mitting the President to make certain financial arrangements for said corporation, impliedly authorized the President, Anthony Yee, to endorse the checks in question and receive payment therefor on behalf of said corporation (R. 24).

10. The District Court erred in concluding in paragraph 4 of the Conclusions of Law that "Anthony Yee dealt for the corporation *in the affairs of its financing* with the knowledge of its officers and directors" (*italics ours*), since the language in italics is so broad as to be misleading, and should have been limited to dealing *in the negotiations with finance companies for the assignment of conditional sales contracts* (R. 25).

11. The District Court erred in concluding in paragraph 3 of the Conclusions of Law that the President, Anthony Yee, had apparent authority to endorse the checks in question and receive payment therefor on behalf of said corporation (R. 24).

12. The District Court erred in concluding in paragraph 6 of the Conclusions of Law that each of said checks had been paid in accordance with the terms thereof (R. 25).

13. The District Court erred in entering its Judgment dismissing the action upon its merits and rendering judgment in favor of the defendant (R. 26).

SUMMARY OF ARGUMENT

I

Appellant brought suit because appellee bank charged appellant's account with twelve checks drawn by appellant upon appellee bank made payable to Waipahu Auto Exchange, Limited. The twelve checks were endorsed in the corporate name by Anthony Yee as president and were cashed by Anthony Yee. The validity of the endorsement and payment is questioned. A prima facie case was established by appellant by a showing that appellant had had on deposit in appellee bank the money represented by said

checks and that appellant had demanded repayment of the same, which demand was refused. Payment by the drawee bank in accordance with the order of the drawer is an affirmative defense to an action brought by a depositor against his bank. The debtor-creditor relation having been established it then became incumbent upon appellee bank to establish payment, the burden of proof being on the bank.

II

Although the trial judge concluded that Anthony Yee, by virtue of his office as president, had *prima facie* authority to endorse and cash the checks in question, appellant contends that the weight of authority and preferable view is that a corporate president does not have such *prima facie* authority by virtue of his office alone.

To rebut any suggestion of express or implied authority in the president to do the acts in question, appellant at the trial sought to introduce into evidence what purported to be the By-Laws of Waipahu Auto Exchange, Limited, the payee corporation, through the testimony of witness Yokono, one of the incorporators, and of Herbert K. H. Lee, also an incorporator, and the attorney for the incorporators of said corporation. The offer was denied. Appellant contends that the denial of this offer was prejudicial and reversible error for the reason that the By-Laws contained provisions bearing directly upon the authority of the president and other officers of the corporation. The contention of the appellant is that the By-Laws were adopted in the manner provided by statute by the incorporators at the time of incorporation and that the ruling of the judge was therefore error.

III

The testimony of witness Yokono adduced on cross-examination, which testimony was substantially the only evidence favorable to appellee bank, did not establish

express or implied authority in Anthony Yee to endorse and cash the checks in question. While Yee did arrange the business relations of Waipahu Auto Exchange, Limited, with appellant and other finance companies, he was not expressly authorized to negotiate or cash any checks received from such companies; nor was it necessary that he have the power to endorse and cash checks in order for him to carry out the powers that were conferred upon him. Accordingly, appellant contends that there was no express or implied authority in Anthony Yee to endorse and cash the checks in question, and that it was error for the trial judge to conclude that he did have such implied authority.

IV

The evidence adduced at the trial, including the testimony of witness Yokono adduced on cross-examination did not establish apparent authority in Anthony Yee to endorse and cash the checks in question. There was no evidence adduced that any manifestation was made by the corporation or by any of its officers and directors which would justify a reasonable person in assuming that Yee had such authority. There was no indication that any of the officers or directors knew that Yee was holding himself out as authorized to do this. There was no evidence of knowledge by the appellee bank of any manifestation of authority that might possibly have been made by the officers and directors of Waipahu Auto Exchange, Limited, or of any reliance thereon. Appellant contends, therefore, that it was error for the trial judge to conclude that Anthony Yee had apparent authority to endorse and cash the checks in question.

V

Evidence adduced by appellee bank from witness Yokono, the treasurer of Waipahu Auto Exchange, Limited, the payee corporation, in an endeavor to show authority in

Anthony Yee to endorse and cash the checks in question, was obtained upon cross-examination. Yokono had been called by appellant for the limited special purpose of identifying and authenticating a document purporting to be the By-Laws of Waipahu Auto Exchange, Limited, and for no other purpose. Despite this, appellee bank, over timely objection, was permitted to conduct the cross-examination referred to. If the testimony of Yokono in any way tends to establish authority on the part of Anthony Yee to endorse and cash these checks, then appellant contends that it was prejudicial and reversible error for the trial court to permit the cross-examination to extend beyond the scope of the direct examination, thereby permitting appellee bank to present evidence upon its case in chief by leading and suggestive questions and through a witness which the appellant did not call for that purpose and by whose testimony appellant did not necessarily care to be bound.

ARGUMENT

I. SINCE PAYMENT IS A DEFENSE, APPELLANT ESTABLISHED A PRIMA FACIE CASE BY SHOWING THAT IT HAD MONEYS ON DEPOSIT IN APPELLEE BANK, AND THAT IT DEMANDED REPAYMENT OF THESE MONEYS, WHICH DEMAND WAS REFUSED.

It is unquestioned that appellant finance corporation was a depositor in the appellee bank, having at all pertinent times sufficient funds on deposit in a commercial account in appellee bank to cover all checks drawn by appellant, including the twelve checks, proper payment of which is in dispute. It is also unquestioned that appellant demanded repayment of the total sum of \$17,726.00, being the aggregate of the twelve checks in question, and tendered the twelve checks to appellee. This demand was refused. These facts were admitted by appellee (R. 14, 40, 41, 43-44), and thus established a debtor-creditor relationship between appellant depositor and appellee bank.

Although no Hawaiian cases are to be found on the subject, it is settled common law that a depositor suing a bank on a check claimed to have been wrongfully paid need allege and prove merely the deposit, the demand for repayment and the refusal of the bank to pay.

In 5 Michie, *Banks & Banking* (Permanent Ed., 1932), sec. 368c, pp. 713-714, it is stated:

"In a suit by a depositor to recover a deposit from a bank, after he has offered evidence of the amount of the deposit and the balance due after crediting the bank with checks which he admitted signing, it is incumbent on the bank to offer evidence that a payment made on a controverted check was a proper credit on the account. The bank has the burden of showing that the payment of a check was to the payee or to a person authorized to receive payment, or that the depositor was guilty of negligence, precluding him from recovering for payment to the wrong person. This is in pursuance of the ordinary rule that the banker must ascertain at his peril the identity of the payee of a check."

And in 5 Zollmann, *Banks & Banking* (Permanent Ed., 1936), sec. 3450, the text states:

"Burden of showing payment of a conceded deposit is on bank or its receiver and should be properly pleaded. The depositor need not prove that the payment has not been made."

As stated in 9 Corpus Juris Secundum, *Banks & Banking*, sec. 327, p. 661:

"Although there is authority to the effect that a plaintiff suing for a bank deposit must prove nonpayment, the generally accepted rule is that, where a bank deposit is shown or conceded, the burden of proving payment rests on the bank, which has the burden of showing that a payment was made on the authority of the depositor."

Hawaii has expressly adopted the common law by statute. (Laws of 1892, c. 57, s. 5, now sec. 1, Revised Laws of Hawaii 1945.)

The case of *Virginia-Carolina J. S. L. Bank v. First & Citizens Nat. Bank*, 197 N.C. 526, 150 S.E. 34 (1929), was a civil action by the drawer to recover of the drawee bank, the amount of its check, paid by said bank, without the valid endorsement of the payees, and charged to the account of the drawer (and also to hold the endorsers on their guarantees of payment). The check in question was made payable to "E. A. Matthews, atty. and James Squire, Bwr." and endorsed "E. A. Matthews, atty., James Squire, Bwr., by E. A. Matthews, Atty." No evidence was offered at the trial showing or tending to show that James Squire had authorized the endorsement. The issue of whether or not the payees named were paid was submitted to the jury, and the verdict was that the bank had paid on an unauthorized endorsement.

On appeal, it was urged that the trial court erred in refusing to dismiss the action at the close of the plaintiff's evidence, it being argued that the plaintiff had made no showing that Matthews was without authority to make the endorsement. The court, in holding there was no error, said in 150 S.E., at page 37:

"The deposit, in the absence of a special agreement to the contrary, creates a debt; this debt can be discharged only by a payment or by payments made to the creditor, or to his order. The burden is on the bank as debtor to show payment to the depositor as creditor or to a person or persons to whom the depositor has authorized payment to be made."

"* * * Where it is admitted or established by evidence that at a certain date a depositor had on deposit with his bank, to his credit, and subject to his check, a sum of money, and the bank contends that it has been discharged of liability by reason of such deposit, either in whole or in part, by the subsequent payment

of a check drawn by said depositor on said bank, the burden is on the bank to show that the amount of the check was paid to the payee named in the check," * * * (or on the payee's valid endorsement). * * * "In the absence of evidence showing such payment, the bank remains liable to the depositor, notwithstanding payment of the amount of the check to a stranger, and notwithstanding the check has been marked 'Paid' by the bank, and charged on its books to the account of the drawer."

The foregoing proposition of law is restated in various types of cases involving a depositor suing the drawee, although on their facts not directly in point.

In *O'Neil v. New England Trust Co.*, 28 R.I. 311, 67 Atl. 63, a case involving a depositor's suit against his bank for paying out the plaintiff's funds on garnishment proceedings to reach the assets of a stranger with the same name, the court in ruling that a verdict for the plaintiff was properly directed, said:

"The plaintiff made out a prima facie case when he proved that he deposited the money in question with the defendant and demanded the same from it. The burden of proving payment to or for the use of the plaintiff was upon the defendant, and it failed to sustain the same."

In *Fourth & Central Trust Co. v. Rowe*, 122 Ohio St. 1, 170 N.E. 439, 441, where the administrator of a depositor in a savings account sued the bank for repayment of a sum paid out by the bank on what was claimed to be a forged check. The court, in holding that the trial court was in error in placing the burden of proof as to the issue of forgery on the plaintiff below, said in 170 N.E., at p. 441:

"The claim of the bank in its first defense was that of payment; and it is well established that such defense is an affirmative one, and that the burden to show the same is upon the party claiming it, which in this case would be the bank."

To the same general effect see:

Boardman v. Connecticut Savings Bank, 133 Conn. 396,
51 Atl. (2d) 925 (forged endorsement);

Levin v. Northwestern Nat'l Bank, 154 Pa. Super. 94,
35 Atl. (2d) 769 (forged check), and cases collected
in

5 Michie, *Banks & Banking* (Perm. ed., 1932), sec. 368c,
and in

5 Zollmann, *Banks & Banking* (Perm. ed., 1936), sec.
3450.

The few cases to the contrary apparently overlook the foregoing fundamental principal of law.

cf. *Duncan v. National Bank of Decatur*, 285 Ill. App.
305, 1 N.E. (2d) 902.

Indeed, the placing of the burden of proof on the bank is well founded in logic as well as in law. The contract of a bank to its depositor is that it will repay to the depositor on demand or according to the depositor's direction (See 9 C.J.S., *Banks and Banking*, sec. 330). Once a depositor determines that he desires to make the payment to a given payee he should be entitled to rely on the bank's contract that it will pay according to the direction of the depositor. The bank is in a position to fully protect itself by paying only to a known payee or on a genuine endorsement (see *City of St. Paul v. Merchants' Nat. Bank*, 151 Minn. 485, 187 N.W. 516, 22 A.L.R. 122, for a general discussion). Thus, if the bank has properly identified the payee, it will be able to prove that payment was made to the payee himself; if the bank has satisfied itself that the endorsement is genuine, then it should be able to prove that fact in court. In the case of a corporate payee, as in the instant case, it is incumbent on the bank to deposit the check in the corporation's duly opened account (which in this case was in another bank [R. 29-30]), or if the agent of the payee insists on cashing the check, then to require proof of his authority to

receive cash for a corporate check. If the required proof of authority is forthcoming, then the bank is in a position to bear the burden of proof in court. The risk involved on the bank in fulfilling its contract is a calculated one, best described as one of the costs of the banking business. From the depositor's standpoint, he is not present in the face to face transaction involved in cashing the check, but he relies on the bank's undertaking. Therefore he should not be and is not required by law to prove that the payee was or was not paid.

It follows that the appellant depositor proved its prima facie case, and it thus becomes necessary to fully examine the remaining evidence properly before the court to determine whether or not appellee established its affirmative defense of payment.

II. APPELLEE BANK DID NOT PROVE PAYMENT OF THE CHECKS IN QUESTION TO THE NAMED CORPORATE PAYEE, BUT, RATHER, IT WAS SHOWN THAT CHECKS MADE PAYABLE TO THE CORPORATE PAYEE WERE PAID IN CASH TO THE PRESIDENT THEREOF ON HIS PURPORTED ENDORSEMENT FOR THE PAYEE.

All of the checks in question were made payable to Wai-pahu Auto Exchange, Limited, a Hawaiian corporation (R. 6, 9, 40). Although there is no direct evidence of the circumstances surrounding the cashing of the checks, an examination of each check (R. 53-64), appellee's admissions in its answer (R. 6-9), and orally (R. 42), leave the obvious inference that Anthony Yee was paid cash on presentation of each check. The trial court properly so found (R. 20-21). Although it is admitted that Anthony Yee was the then president of the corporate payee, there is no showing in the record that he, an individual, was expressly authorized to endorse and cash corporate checks.

A. THE WEIGHT OF AUTHORITY AND THE BETTER VIEW IS THAT A PRESIDENT OF A CORPORATION DOES NOT HAVE PRIMA FACIE AUTHORITY MERELY BY VIRTUE OF HIS OFFICE AS PRESIDENT, TO ENDORSE AND CASH CHECKS PAYABLE TO HIS CORPORATION.

Appellant submits that there is no magic in the word "president." A president of a corporation is nothing more than another agent. He is an officer, to be sure, and the titular executive head of the company, but he, like any other officer, must look to the board of directors for his power. It is common knowledge that corporations differ greatly in the powers they award their presidents. A president can, we suppose, be authorized to carry on all business transactions for a corporation; indeed, he can act as delivery boy and janitor, too. Or he can be a mere figurehead. But, it is not logical to infer that a president of a corporation, merely because he is such, can walk into a bank,³ sign over a check made payable to the corporation and walk out with the cash.

Appellant respectfully submits that the law, as in most instances, follows logic and does not, merely by virtue of his office, grant such power to a president.

Brady, *Forged and Altered Checks* (1925), sec. 49, p. 209, states:

"* * * The president of a corporation, for instance, has no authority merely because of the fact that he is president to endorse checks payable to the corporation. Anyone who deals with such an official, thinking otherwise, does so at his peril."

Cases on this proposition are collected in 94 A.L.R. 567, which, in general, are in accord with Brady, *supra*.

A case in point therein cited is *Economy Auto Supply Co. v. Fidelity Union Trust Co.* (1928), 105 N.J.L. 206, 144

³ And it is to be kept in mind that in our present case the defendant bank was not the bank which handled the corporate payee's account (R. 22, 29-30).

Atl. 30. In that case the drawer sued defendant drawee bank for moneys claimed to have been paid out of the funds of the plaintiff's bank account upon unauthorized endorsements of the corporate payee. The checks in question were endorsed by the president of the corporate payee to another corporation, and paid to the endorsee by the bank.

In sustaining a directed verdict by the trial court in favor of the plaintiff drawer, the appellate court held that the power to endorse checks was not conferred on a corporate president under his general powers, and further held that in the case there presented, there was no showing of specific authority granting that power. See also *Hibernia Nat. Bank v. National Bank of Commerce*, 204 La. 777, 16 So. (2d) 352, wherein it is stated, in 16 So. (2d), on page 357:

“* * * It is also the universal rule of law that the president of a corporation by virtue of his office, does not have the power to endorse checks, drafts, notes and other obligations payable to the corporation.”

Cases in which the authority of the president of a corporation to endorse and pass title to negotiable instruments has been upheld are generally distinguishable for the reason that in such cases the president in negotiating the same has been acting for an apparent corporate purpose. Such is not the case here, for no apparent corporate purpose would be served by entrusting substantial sums of cash to Mr. Yee. Quite the contrary, for it is apparent that such a course of conduct would make proper corporate accounting and bookkeeping difficult and give rise to the possibility of defalcation. The proper corporate and banking practice would be to require the check to be deposited in the regular corporate bank account.

It is therefore submitted that Anthony Yee did not have any prima facie authority to endorse and cash corporate checks just because he was president, as concluded by the trial judge (R. 24).

B. IT WAS ERROR FOR THE TRIAL COURT TO EXCLUDE THE BY-LAWS OF THE CORPORATE PAYEE, WHICH CONTAINED PROVISIONS MATERIAL TO THE AUTHORITY OF THE PRESIDENT AND OTHER OFFICERS.

The purported By-Laws of Waipahu Auto Exchange, Limited, were, on the objection of appellee bank, not admitted in evidence. Appellant submits that this exclusion was prejudicial error, because the By-Laws contained several sections very pertinent to the question of the authority of the corporation president to endorse and receive cash for checks made payable to the corporation.

In the By-Laws financial duties are clearly delegated to the treasurer, not the president. To quote:

“The Treasurer shall have custody of all the funds, notes, bonds and other evidences of property of the corporation, and shall be responsible for keeping all the books and accounts of the corporation * * *”
(R. 117).

Likewise, the By-Laws require the signatures of two officers on corporate documents and instruments:

“ARTICLE V.

EXECUTION OF INSTRUMENTS

“Section 1. Proper Officers. Except as otherwise provided by these by-laws or by law, all checks, drafts, notes, bonds, acceptances, deeds, leases, contracts, and all other documents and instruments, shall be signed, executed and delivered by the President or a Vice-President and by the Treasurer or the Secretary; provided, however, that the Board of Directors may from time to time by resolution authorize checks, drafts, bills of exchange, notes, orders for the payment of money, licenses, endorsements, stock powers, powers of attorney; proxies, waivers, consents, returns, re-

ports, applications, notices, agreements or documents, instruments or writings of any nature to be signed, executed and delivered by such officers, agents or employees of the corporation, or any one of them, in such manner as may be determined by the Board of Directors." (R. 118.)

The Hawaiian statute pertaining to the adoption of corporate by-laws is quoted in its entirety in Appendix I. The pertinent part is as follows:

"* * * provided, however, that by-laws may be adopted at the incorporation of a corporation by the signers of the articles of association; * * *." (Hawaiian C. C. 1859, s. 1431, as amended—now sec. 8335, Revised Laws of Hawaii 1945.)

It was shown at the trial that the by-laws were adopted in the following manner:

Herbert K. H. Lee, an attorney in Honolulu, drew up the Articles of Incorporation and proposed By-Laws for Waipahu Auto Exchange, Limited (R. 109), preparing spaces for only the four initial stockholders, and the four real incorporators, Anthony Yee, who was to be President, Fred H. Shintaku, who was to be Vice-President and General Manager, Kay Y. K. Pang, who was to be Secretary, and Takeshi Yokono, who was to be Treasurer (R. 110, 105, 107). Anthony Yee picked up the papers at lawyer Lee's office (R. 109), and a meeting of the four incorporators was held on November 23, 1948, at the corporation office at Waipahu, a distance of about twenty miles from the attorney's office, the transaction being handled this way to avoid a trip to Honolulu by the said four incorporators (R. 85-89, 132-133). At the meeting, the proposed By-Laws and Articles of Association were read, discussed and signed (R. 89).

The signing of the By-Laws by the four incorporators was an express adoption in writing, the paragraph preceding the signatures providing:

"The undersigned, Anthony Yee, Fred H. Shintaku, Kay Y. K. Pang and Takeshi Yokono, being the incorporators of Waipahu Auto Exchange, Ltd., at the incorporation of the same at Honolulu, Territory of Hawaii, have adopted the foregoing as the by-laws of the corporation, this 23rd day of November, A.D. 1948" (R. 122).

The By-Laws and Articles were returned to lawyer Lee (R. 110) and since Hawaiian law does not require that By-Laws be filed, on November 27, 1948 (R. 103), only the Articles were filed at the Territorial Treasurer's Office. The Articles were returned by the Treasurer's Office to lawyer Lee, however, since he had overlooked the fact that a Hawaiian statute requires that there be five incorporators (R. 111). Hence lawyer Lee signed the Articles as a fifth "dummy" incorporator (R. 111, 105). Although he did not sign the By-Laws (R. 122), it is undisputed that he had drawn them up, that he approved them by implication (R. 111), and thereafter, during the life of the corporation, had kept the By-Laws in his file as though they were the functional By-Laws of the corporation (R. 127).

It is also undisputed that lawyer Lee was not a stockholder of the corporation (R. 127) and that he was just a dummy incorporator (R. 111). Furthermore, the Treasurer of Waipahu Auto Exchange, Limited, Takeshi Yokono, testified that these were the By-Laws under which the corporation acted (R. 88).

After the foregoing facts had been developed, appellant submitted to the trial court that the applicable statute pertaining to the adoption of the By-Laws had been complied with—if not strictly, at least substantially, which is all that the law requires—and asked that the By-Laws be received in evidence (R. 127, 134). Appellee bank made several objections to the admission of the By-Laws covering the four following points (R. 134-135). Appellant's discussion follows each point.

1. “* * * Because it affirmatively appears that they were not adopted by the corporation in accordance with the provisions of law and in fact are not by-laws; * * *.”

Appellant has shown by the facts set out above that there was strict compliance, or at least substantial compliance, with the applicable statute. Appellant submits that it is the law that in complying with mandatory statutes pertaining to the adoption of by-laws, substantial compliance is all that is required. 8 Fletcher, *Corporations* (Perm. Ed., 1931), sec. 4173, p. 649.

However, appellant submits that in this instance there was strict compliance with the statute. Even though four of the five incorporators (the four with the entire interest in the corporation) expressly adopted the By-Laws in writing (R. 122), the statute does not require that the adoption be in writing. The fifth “dummy” incorporator (R. 111) drew up the By-Laws (R. 109), approved them by implication (R. 111), and kept the executed copy in his file as though it constituted the functional By-Laws of the corporation (R. 127). Certainly, even though he did not sign them, this constituted an actual adoption of the By-Laws by the fifth “dummy” incorporator, if not expressly—then impliedly. In VII Wigmore on *Evidence* (3rd Ed., 1940), sec. 2134 (2), p. 580, it is stated: “accordingly, if there is no signature, and the substantive law makes no requirement as to a signature, the execution may be established” * * * “by evidencing some oral act of acknowledgment or assent.”

2. “* * * secondly, and equally important, because there has been no showing made—The statute providing that there is no constructive notice of the By-Laws on outsiders, there is no showing made that we had or could have obtained actual notice of the by-laws; * * *.”

Appellant submits that this objection is not well taken because the By-Laws were entirely relevant on the issues

of the express or implied authority of Anthony Yee to endorse and receive cash for checks made payable to the corporation. Whether or not the bank had actual or constructive notice of the By-Laws in no way affects the actual authority granted or limited thereby since this involved the internal workings of the corporation. This was expressly brought to the attention of the trial court (R. 135-136).

3. “* * * next, on the ground that it appears from the evidence that has been adduced so far that even the statutory requirement of having a certified copy available, certified by the secretary and available for examination by the stockholders, which appears in this same section, was not complied with; * * *.”

Appellee was apparently making reference to the fact that the cited statute (set out in Appendix I) in a separate paragraph from the paragraph dealing with the adoption of the By-Laws states that a copy of the By-Laws shall be maintained at the corporation office for inspection by the stockholders or members. It is obvious that such a requirement could not possibly affect the validity of the adoption of the By-Laws or its admissibility in evidence. 8 Fletcher on *Corporations* (Perm. Ed., 1931), sec. 4173, p. 650.

4. “* * * next, on the ground that the only testimony that they acted as though these were the by-laws is a statement by the attorney that he assumed they were the by-laws because he had them in the file all during the existence of the corporation.”

This last objection by appellee was evidently aimed at appellant's statement regarding the admissibility of the By-Laws (R. 133-134). Appellant had further bolstered its argument that these were the authentic By-Laws by making reference to the fact that, even if not properly adopted, these By-Laws had been acted upon as if they were the By-Laws of Waipahu Auto Exchange, Limited. In doing

so, appellant was referring to the testimony of Takeshi Yokono that these were the By-Laws under which the corporation acted (R. 88). This was in addition to the testimony of the attorney, referred to in the quoted portion of the objection. Accordingly, appellee's statement is in error.

The trial court was evidently impressed by the first of these four objections but not by the last three objections. Denying the admission into evidence of the purported By-Laws, the court stated as follows:

"In the absence of any meeting of either stockholders or directors with relation to these purported by-laws the offer is denied at the present time." (R. 136)

However, there would appear to be no requirement in section 8335, Revised Laws of Hawaii 1945, referred to above and set out in Appendix I, requiring the incorporators, as distinguished from stockholders, to adopt the by-laws at a meeting. Appellant submits that this ruling constituted reversible error in the face of the foregoing facts.

III. THE RECORD DOES NOT REFLECT ANY BASIS FOR THE TRIAL COURT'S CONCLUSION THAT ANTHONY YEE, THE PRESIDENT OF THE CORPORATE PAYEE, HAD IMPLIED AUTHORITY TO ENDORSE THE CHECKS IN QUESTION AND RECEIVE PAYMENT THEREFOR ON BEHALF OF SAID CORPORATION.

The trial court concluded that Anthony Yee would have this implied authority "by virtue of the acts of officers and directors of the corporation in permitting the president to make financial arrangements for the corporation" (R. 24).

It is submitted by appellant that this conclusion was clearly erroneous, there being no evidence in the record to support such a conclusion.

A. THE RECORD MERELY SHOWS THAT ANTHONY YEE WAS PERMITTED TO DEAL WITH APPELLANT FINANCE COMPANY AND OTHER FINANCE COMPANIES IN THE ASSIGNMENT OF AUTOMOBILE CONDITIONAL SALES CONTRACTS.

The only evidence pertaining to Anthony Yee making "financial arrangements for the corporation" (Waipahu Auto Exchange, Limited) is to be found in the testimony of Takeshi Yokono, the treasurer and one of the incorporators, on his cross-examination by appellee. This testimony, for reasons hereinafter set forth, we submit, was erroneously admitted into evidence. However, it is to be noted that the "financial arrangements" only embraced dealings with the finance companies regarding the assignment of conditional sales contracts and that is all.

The following pages of testimony include all evidence in the record on the above issue: R. pp. 97, 99-100, 159-161. Such testimony, appellant submits, clearly shows that Anthony Yee was not the general manager of Waipahu Auto Exchange, Limited (R. 96-97), and that his authority in dealing with the financial affairs of the corporation was strictly limited to dealing with finance companies from which, we submit, no authority to cash checks can be implied.

Appellant further submits that this testimony will not support the broad language used in the Findings of Fact No. 13, to-wit: "The Treasurer was relying upon the President *for the financial operations of Waipahu Auto Exchange, Ltd.*" (R. 24) (*Italics supplied.*) Likewise the language used in the trial court's Conclusion of Law No. 2 and No. 4 with respect to financial arrangements made by the president (R. 24-25), it is submitted, is too broad. The trial court concluded in Conclusion of Law No. 2, "That by virtue of the acts of officers and directors of the corporation in permitting the President *to make financial arrangements* for the corporation * * *" the President had implied author-

ity to cash the checks in question (R. 24). In Conclusion of Law No. 4, the court's language states, "That Anthony Yee dealt for the corporation *in the affairs of its financing* with the knowledge of its officers and directors" (R. 25). In each of the foregoing instances, appellant submits that the court's language is too broad and fails to properly evaluate the abovementioned testimony to the effect that the President's authority was limited to making financial arrangements with the finance companies and not that the President conducted all financial operations of the corporation.

B. EXPRESS AUTHORITY TO REPRESENT A CORPORATION IN CERTAIN FINANCING OPERATIONS NOT INVOLVING BANKING TRANSACTIONS DOES NOT GIVE RISE TO AN IMPLIED AUTHORITY TO CASH CHECKS MADE PAYABLE TO THAT CORPORATION UNLESS IT IS NECESSARY TO THE EXPRESS AUTHORITY GRANTED.

Appellant submits that the foregoing evidence cannot support a finding that Anthony Yee had implied authority to endorse and cash checks made payable to the corporation.

Implied authority is a form of actual authority implied from powers expressly given, or from the circumstances of the case. It may arise as an incident to authority expressly granted, in which case it must be reasonably necessary to the exercise of the express authority granted.

As stated in 2 *C.J.S.*, Agency, sec. 99, p. 1230:

"* * * to permit the inference of authority in an agent it must appear that the act or transaction involved was necessary to the promotion of the duty or execution of the purpose expressly delegated to the agent * * *."

"The test is whether, in case of a failure to perform the particular act in dispute, the agent could effectuate the purpose of his employment, the only powers included in the implied mandate being such as are, as a practical matter indispensable and essential to carry out the duties actually delegated to the agent * * *."

And it is to be kept in mind that an express limitation such as is contained in the By-Laws of Waipahu Auto Exchange, Limited (as argued *supra*) acts to negative any grant of authority otherwise inferred. (See 2 C.J.S., Agency, sec. 99, 1230.)

In discussing the specific point of authority to endorse commercial paper properly received by the agent, it is said in 2 C.J.S., Agency, sec. 112, p. 1303:

“* * * so one authorized to accept checks or other negotiable instruments as payments of debts to his principal is not empowered to sell, transfer or indorse them, and this is true, although the agent is given authority to collect in cash, * * *.”

In *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 65 N.E. 136, the court stated at 65 N.E. 138:

“The weight of authority seems to be in favor of the contention of appellant that authority to indorse commercial paper can only be implied where the agent is unable to perform the duties of his agency without the exercise of such authority. In other words, the power of an agent to indorse commercial paper for his principal must be a necessary implication from an express authority conferred upon such agent. * * * The power of an agent to bind the principal by the making or indorsing of negotiable paper can only be charged against the principal by necessary implication, where the duties to be performed cannot be discharged without the exercise of such a power, or where the power is a manifestly necessary and customary incident of the character bestowed upon the agent, and where the power is practically indispensable to accomplish the object in view. * * *.”

Jackson Paper Mfg. Co. v. Commercial Nat. Bank, *supra*, was a case brought by appellant-payee of a check against the drawee bank for paying a corporate check upon the endorsement of the supervisor and manager of the payee's paper

mill purportedly acting for the corporation, it being held that the supervisor and manager had no implied authority to negotiate this check.

Applying the law to the facts at hand, all that Anthony Yee was authorized to do in regard to the financing arrangements was to handle the dealings of Waipahu Auto Exchange, Limited, with the finance companies concerning the sale of automobile conditional sales contracts. In the case here presented, appellant finance company protected itself by directing appellee bank to pay the money to the corporation, Waipahu Auto Exchange, Limited. The money was paid instead to an individual. Appellant submits that there is no necessity or custom shown requiring or permitting that individual, even though he be president, to receive cash for checks clearly payable to his principal.

On the contrary, it is undisputed that the office of treasurer of this corporate payee was held by the witness, Yokono (R. 94); that not Yee, the president, but Yokono, in his capacity as treasurer, and as a part of his regular duties attended to the making of deposits for Waipahu Auto Exchange, Limited (R. 144-145); that a corporation bank account was maintained in the Waipahu Branch, Bank of Hawaii, and that all of the checks drawn thereon by Waipahu Auto Exchange, Limited, during its corporate existence, were signed, not by Yee, the president, but by T. Yokono, Treasurer, and countersigned by F. H. Shintaku, Vice-President (R. 29-30). There was no showing of necessity for Anthony Yee in his dealings with the finance companies to receive cash from the banks for checks payable to the corporation.

Nowhere does it appear that the other officers of Waipahu Auto Exchange, Limited, had any knowledge of the cashing of checks by Anthony Yee. Nowhere does it appear that Anthony Yee purported to represent the corporation in any other banking transactions.

Certainly, no case was made out for the inference of implied authority in Anthony Yee for the endorsing and cashing of corporate checks. See *Doeren v. Krammer*, 141 Minn. 466, 170 N.W. 609, and *Walsh v. American Trust Co.*, 7 Cal. App. (2d) 654, 47 Pac. (2d) 323, for good discussions of implied authority to endorse and cash checks.

The rationale in support of appellant's argument that there should be no authority implied in Yee to cash checks made payable to his corporation is found in Brady, *Forged & Altered Checks*, sec. 50, p. 217:

“* * * Every bank knows that it is customary for a corporation to deposit checks payable to it in an account standing in its own name,⁴ and that it is unusual for the corporation to permit an agent to deposit its checks in his individual account or to present them to a bank for the purpose of having them cashed. Therefore, when a bank is approached by an agent, having in his possession a check payable to a corporation or individual by whom he is employed, it should take notice that something may be wrong * * *.”

Here, as in the usual case, it was not customary or necessary for Yee to cash the checks just because he was allowed to represent his corporation in dealing with the finance companies. There is no showing that cash received therefrom was either required or needed in his authorized relations with such concerns.

The trial court, we submit, erred, therefore, in concluding in paragraph 2 of its Conclusions of Law (R. 24) that there was this implied authority in Anthony Yee.

⁴ Which in this case was in Bank of Hawaii, Waipahu Branch (R. 29-30). Waipahu is the town where the corporation office was located (R. 86), being some twenty miles from Honolulu (R. 132).

IV. THE RECORD DOES NOT REFLECT ANY BASIS FOR THE TRIAL COURT'S CONCLUSION THAT THE PRESIDENT, ANTHONY YEE, HAD APPARENT AUTHORITY TO ENDORSE AND CASH THE CHECKS IN QUESTION.

Without any evidence whatsoever involving the circumstances of the transactions whereby the disputed checks were cashed by the appellee bank, the trial court nevertheless concluded that Anthony Yee had apparent authority to endorse the checks in question and receive payment therefor on behalf of Waipahu Auto Exchange, Limited. This was clearly wrong.

A. THERE IS NOTHING IN THE RECORD TO INDICATE THAT WAIPAHU AUTO EXCHANGE, LIMITED, THE CORPORATE PAYEE, HELD ANTHONY YEE OUT AS POSSESSING AUTHORITY TO ENDORSE AND CASH ANY CHECKS MADE PAYABLE TO THE CORPORATION.

Apparent authority is based on estoppel. An essential element is that the principal held the agent out as possessing the authority in question—which in this case is the claimed authority of Anthony Yee to endorse and cash corporate checks.

In *Metropolitan Life Ins. Co. v. Henderson*, 92 F. (2d) 891, 895 (C.C.A.-9) *The Restatement of the Law of Agency*, sec. 27, is quoted with approval to the effect that:

“Apparent authority to do an act may be created by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes a third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.”

In the same case 2 *Am. Jur.*, Agency, sec. 101, is quoted as follows:

“Apparent authority * * * is that which, though not actually granted, the principal knowingly permits the agent to exercise, or which he holds him out as possessing.”

In other words, it must be some conduct of the principal himself which causes the third party to reasonably believe that the agent is authorized to act. As stated in 2 *Am. Jur.*, Agency, sec. 103, p. 85:

“Moreover, the apparent authority for which the principal may be liable must be traceable to him, and cannot be established solely by the acts and conduct of the agent; the principal is only liable for that appearance of authority caused by himself.”

See also: *Hartline v. Mutual Benefit Health & Accident Ass'n*, 96 F. (2d) 174 (C.C.A.-5).

Nowhere in the record does it appear that anyone connected with Waipahu Auto Exchange, Limited, held Anthony Yee out as having authority to cash corporate checks. Nowhere does it appear that said corporate payee knew or should have known that he was cashing the checks in question or any other checks payable to the corporation. Indeed, the bank made this lack of knowledge possible by paying cash to Anthony Yee—so that the checks were not deposited in the corporation bank account in Waipahu.

Without having shown knowledge, actual or constructive, on the part of the principal corporation that this conduct by its president was taking place, how can it be said that the corporation held him out as possessing such authority?

B. ASSUMING THAT THE RECORD DOES ESTABLISH THAT THE CORPORATE PAYEE HELD ANTHONY YEE OUT AS POSSESSING AUTHORITY TO ENDORSE AND CASH THE CHECKS IN QUESTION, THERE IS NO EVIDENCE THAT THE APPELLEE BANK EITHER KNEW OR RELIED UPON THIS.

Again the record is bare as to the reasons why the bank cashed the checks in question on presentation by Anthony Yee. There is no showing that the checks were cashed in the furtherance of corporate business; for all that appears, the

bank was accommodating Anthony Yee and Anthony Yee alone. In order to hold the principal liable on the basis of apparent authority, the one seeking to hold the principal must have relied on conduct by the principal.

Again, in 2 *Am. Jur.*, Agency, sec. 103, p. 85, it is said:

“* * * Furthermore, a party dealing with an agent must prove that the facts giving color to the agency were known to him when he dealt with the agent, and that he believed the agent was acting within his authority; if he has no knowledge of such facts, he does not act in reliance upon them and is in no position to claim anything on account of them * * *.”

And see 1 A.L.I., *Restatement of Agency*, sec. 8, comment b, wherein it is stated:

“Apparent authority, however, exists only with respect to a person to whom such a manifestation has been made or to whom knowledge of it comes.”

Here we have neither a showing of conduct by the principal nor a showing of reliance on anyone but the agent.

C. THE APPELLEE BANK WOULD HAVE NO DEFENSE TO THE CASHING OF THE CHECKS INVOLVED IN THIS SUIT BY REASON OF APPELLANT-DEPOSITOR'S HAVING CASHED A SIMILAR CHECK NOT THE SUBJECT OF THIS SUIT UNLESS THE APPELLEE BANK COULD SHOW KNOWLEDGE OF AND RELIANCE ON THE APPELLANT-DEPOSITOR'S ACTION.

It is admitted that a check similar to those here involved was cashed in the office of appellant finance company. The date of the check so cashed was May 9, 1949, and in sequence was cashed after nine of the checks here involved had already been cashed by the banks and before the last three of the checks were likewise cashed by the banks. Appellant submits that the fact that appellant cashed said check has no legal effect on this case on the present state of the record.

All that is indicated is that in hoodwinking the bank twelve times Anthony Yee succeeded in hoodwinking appellant finance company once. There can be no ratification of an agent's acts by one other than the principal and even if there could be there is no showing that the finance company was or should have been aware of the nine prior checks having been cashed by Anthony Yee. As to the fact that the banks cashed three checks subsequent to appellant cashing one, the appellee bank cannot be heard to complain unless it was actually misled by the appellant's conduct. The record does not establish that to be the fact.

V. THE ONLY EVIDENCE POSSIBLY RELEVANT TO PROVE THE NECESSARY IMPLIED OR APPARENT AUTHORITY OF ANTHONY YEE WAS THAT ADDUCED IN THE CROSS-EXAMINATION OF TAKESHI YOKONO, THE TREASURER OF THE CORPORATE PAYEE; THAT EVIDENCE WAS ADDUCED DURING IMPROPER CROSS-EXAMINATION, AND IF IT WOULD SUPPORT SUCH FINDINGS, THE IMPROPER CROSS-EXAMINATION WAS PREJUDICIAL ERROR.

The only testimony adduced at the trial which might have any relevancy upon the authority of Anthony Yee to act on behalf of the Waipahu Auto Exchange, Limited, in financial matters was that of Takeshi Yokono, the Treasurer of that corporation. It will be recalled that this witness was called by plaintiff-appellants for the limited purpose of laying the foundation for the introduction of that corporation's By-Laws (R. 85-88), which were not admitted into evidence (R. 136). Thereafter defendant-appellee conducted a lengthy cross-examination of Yokono in an endeavor to explore the method of operation of Waipahu Auto Exchange, Limited, and the authority of Anthony Yee to act for it (R. 94-101, 136-190).

It is the settled rule in the Federal courts, which rule has been enunciated by this Court on several occasions, that a party calling a witness may restrict the cross-exam-

ination to subjects dealt with in the direct examination, the cross-examination being properly limited to matters embraced in the examination in chief only.

Aplin v. United States, 41 F. (2d), 495 (C.C.A. 9).
Chevillard v. United States, 155 F. (2d), 929, (C.C.A. 9).

In one of the leading cases on the subject, *Houghton v. Jones*, 1 Wall. 702 (1863), the United States Supreme Court held that the trial court had correctly sustained the objection to questions on cross-examination inquiring into matters not touched upon in the direct examination, stating, at p. 706:

“The rule has long been settled, that the cross-examination of a witness must be limited to the matters stated in his direct examination. If the adverse party desires to examine him as to other matters he must do so by calling the witness to the stand in the subsequent progress of the cause.”

In *Aplin v. United States*, *supra*, this Court, in a criminal action, stated in 41 F. (2d) at 496:

“Subject to certain exceptions, not material here, it is the settled rule in the federal courts that the cross-examination of a witness is limited to matters embraced in the examination in chief.”

This rule should, and does, have particular application in cases where the witness is called for purposes of identification or for a particular or formal point. In *O'Connell v. Pennsylvania Co.*, 118 Fed. 989 (C.C.A.-6), plaintiff had called a witness in a personal injury action for the limited purpose of identifying the number of a railroad car. On cross-examination, over objection, the defendant was permitted to examine this witness as to the condition of the car so identified, the theory of plaintiff's case being that it was defective. The appellate court reversed the lower court

on other grounds, but took occasion to criticize the lower court for permitting the cross-examination complained of, stating at page 991:

“While we are disposed to concede to a trial judge wide limits in the suspension or enforcement of the rule in reference to the proper limits of a cross-examination and in respect to the order in which evidence is to be introduced, yet we must reserve to this, as a reviewing tribunal, such authority in respect to even such questions of practice as that any serious injury to the rights of the party complaining of the relaxation of the rule may be corrected by granting a new trial, if necessary.”

The court went on to indicate that it felt that in that case the plaintiff had been prejudiced because the defendant asked for and obtained a directed verdict at the close of plaintiff's case based on the affirmative evidence adduced on cross-examination of this witness as to the condition of the railroad car.

And in *McCrea v. Parsons*, 112 Fed. 917 (C.C.A.-7), one of the plaintiffs was called as a witness for the limited purpose of identifying a stated account upon which suit was brought. The appellate court held that the trial judge had correctly sustained an objection to cross-examination extending to the nature of the transaction between the parties, as such testimony had not been the subject of the examination in chief and went to the affirmative defense of illegality of the transactions giving rise to the stated account.

See also 5 Jones, *Commentaries on Evidence* (2nd ed., 1926), sec. 2341, p. 4580, and cases collected therein.

Also it has been held not to be error to sustain objections to cross-examination designed to bring out evidence supporting the defendant's case or his affirmative defense.

United States v. Hornstein, 176 F. (2d) 217 (C.C.A.-7).
Goddard v. Creffield Mills, 75 Fed. 818 (C.C.A.-2).

So much for the rule. Witness Yokono was called for the limited purposes of authenticating and identifying a document (R. 85-88). On cross-examination over timely objections (R. 94, 96, 97-98, 99, 137-139, 143-144, 146, 149, 153-154, 163) defendant was permitted to examine him concerning the method of operation of Waipahu Auto Exchange, Limited. This, we submit, is in clear violation of the rule in the federal courts and was error. But, of course, every error is not reversible error. In *Wills v. Russell*, 100 U.S. 621 (1880), the Supreme Court noted that it was never error for the trial judge to enforce the rule limiting cross-examination, but held that the relaxation of the rule will not be reversible error unless the party is injured thereby. As stated in *Union Electric Light & Power Co. v. Snyder Estate Co.*, 65 F. (2d) 297 (C.C.A.-8), at 302:

“It is the rule of this court that a party who calls a witness may restrict his cross-examination to the subjects of his direct examination, and a violation of this right, if prejudicial, is reversible error. If the cross-examiner wishes to inquire of the witness concerning matters not touched upon in the direct examination, he must make the witness his own.”

In that case the court determined that it was prejudicial to permit defendant to cross-examine as to matters not touched upon in the direct.

In determining whether, in the instant case, there was prejudicial error, in permitting the extensive cross-examination, we are assuming that which we do not believe the evidence to show, namely, that the testimony of Yokono would establish implied or apparent authority in Anthony Yee, as president, to endorse and cash checks payable to Waipahu Auto Exchange, Limited. Having so assumed, we submit, that it was clearly prejudicial to permit the cross-examination conducted by counsel for defendant.

One of the reasons given in support of the federal rule limiting cross-examination to the scope of the direct ex-

amination is that the party calling a witness stands as a sponsor for the truth of his witness's testimony and is to a certain extent bound thereby. *Harrold v. Territory of Oklahoma*, 169 Fed. 47 (C.C.A.-8) ; *Ferry-Hallock Co. v. Orange Hat Box Co.*, 185 Fed. 816 (C.C.N.J.). Witness Yokono, insofar as this plaintiff is concerned, was called only to identify and authenticate a document. Plaintiff did not intend nor desire to stand as "sponsor for the truth" or to be bound by any testimony that he might be able to give in connection with defendant's affirmative defense of payment. If defendant believes that witness Yokono can assist in the establishment of this defense, let it call him as a witness, stand sponsor for his veracity, and be bound by his testimony. By the practice permitted in the district court, the positions of the parties have been reversed.

Another way in which the parties have been reversed in their proper positions to plaintiff's prejudice is with respect to the right of cross-examination.

For good cause, although none appears in this case, admittedly the trial court may permit the hearing of testimony out of order and so permit the defendant, while a witness for the plaintiff is on the stand, to examine him as a witness of the defendant. But such was not the practice in this case. The court specifically stated that Yokono was not being examined as a witness for the defendant (R. 152), and specifically ruled that Yokono, although called for a limited special purpose, nevertheless could be questioned on cross-examination beyond that scope (R. 144).

That this was prejudicial to plaintiff's case we believe is patent. By this tactic defendant obtained the advantage of making witness Yokono his own for the purpose of presenting evidence material to its affirmative defense while precluding cross-examination by plaintiff by the use of leading questions. Defendant obtained thereby the advantage of eliciting testimony from this witness through leading and suggestive questions while, under the ruling of the court,

plaintiff was limited to direct questioning. For all the foregoing reasons, appellant submits that the trial court erred in having allowed the cross-examination to wander so far afield. If, contrary to appellant's argument in III and IV supra, this Court should find that evidence adduced during said cross-examination supports the trial court's conclusion of applied or apparent authority, then appellant submits that the trial court's error was obviously prejudicial and therefore reversible error.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court should be vacated and set aside and a new trial ordered.

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APPENDIX I

(Hawaiian C.C. 1859, s. 1431, as amended—
now sec. 8335, Revised Laws of Hawaii 1945)

“Sec. 8335. By-Laws; corporation procedure. The by-laws of a corporation may be adopted, amended or repealed by the vote of the holders of not less than a majority of all of the shares of stock outstanding, or if two or more classes of stock have been issued, of a majority of each class of stock outstanding and entitled to vote, or in case of a non-stock corporation, the majority of its members present at any meeting duly called and held, the notice of which shall have stated that a purpose of the meeting is to consider the adoption, amendment or repeal of the by-laws; provided, however, that by-laws may be adopted at the incorporation of a corporation by the signers of the articles of association; provided, further, that the articles of association or charter or by-laws of any corporation may require the authorization or approval of a larger proportion of the stockholders or members, or of any class or classes thereof for the adoption, amendment or repeal of by-laws of the corporation, and also may impose any other restrictions on the adoption, amendment or repeal of by-laws and, in any such case, such provisions of the articles of association or charter or by-laws shall be complied with in order to effect any such adoption, amendment or repeal.

Every corporation shall keep in its principal office for the transaction of its business in the Territory the original or a copy of the by-laws as amended or otherwise altered to date, certified by the secretary or other proper officer, which shall be open to inspection by the stockholders or members at all reasonable times during office hours.

No person dealing with the corporation shall be charged with constructive notice of the by-laws.”

No. 12,678

IN THE

**United States Court of Appeals
For the Ninth Circuit**

FEDERAL SERVICES FINANCE CORPORATION, a Corporation,

Appellant,

vs.

BISHOP NATIONAL BANK OF HAWAII AT
HONOLULU, a Corporation,

Appellee.

**Appeal from the United States District Court
for the Territory of Hawaii.**

BRIEF FOR APPELLEE.

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Appeal from the United States District Court
for the Territory of Hawaii.

BRIEF FOR APPELLEE.

JURISDICTION.

Jurisdiction of the court below was based on diversity of citizenship in conformity with *Title 28 U.S.C.* Sec. 1332. The jurisdiction of this court on appeal rests in *Title 28 U.S.C.* Secs. 41, 1291, 1294.

STATEMENT OF FACTS.

The appellant corporation drew certain checks on the appellee bank payable to the order of the Waipahu Auto Exchange, Ltd., during the months of January

through May, 1949. One of the checks was endorsed, "Waipahu Auto Ex. Ltd. by Anthony Yee, President", cashed by the appellant at its office, and deposited to the appellant's account with the appellee (Deft. Ex. 2) (R. 71, 72). The other checks, the payment of which is in dispute in this case, were endorsed in identically or substantially the same manner and cashed by the appellee (Plff. Exs. B-1-B-12).

Cancelled checks in dispute were returned to the appellant each month with a bank statement which contained the inscription "* * * If you do not so notify us within thirty days from this date you will be deemed to have accepted the statement as correct and the vouchers and checks as genuine." (R. 23). The appellant never notified the bank of any irregularities until after the period in dispute, and admits it did not examine the endorsements on the checks until after defalcations of Yee were discovered (R. 78-80).

It is alleged by the appellant in its complaint and in its amended complaint that Anthony Yee wrongfully and without authority endorsed the checks with the name of the payee (R. 4-16). In appellant's opening statement, it was stated, "We will show that Anthony Yee, president, was not authorized to endorse and receive cash for these checks." (R. 35, 36).

By way of proof, Takeshi Yokono, treasurer of the Waipahu Auto Exchange, Ltd. (hereinafter called the payee corporation), was called to the stand by the appellant to identify what purported to be by-laws of the payee corporation. The apparent purpose of this testimony and of the exhibit was to establish the

lack of authority of the president to endorse and cash checks of the payee corporation. The offer in evidence of the purported by-laws was rejected because of a failure to show adoption in compliance with the corporate statutes of the Territory of Hawaii. The president of the payee corporation handled all dealings with finance companies and largely managed and controlled this most informally organized and irregularly conducted corporation (R. 160, 161 *et passim*).

A more detailed statement of those facts pertinent to the various points to be hereinafter discussed will be set out under such discussions.

QUESTIONS INVOLVED.

1. Did the trial court err in excluding the purported by-laws of the payee corporation from evidence, and, if so, is such error material?

2. Did the trial court err in permitting the scope of cross-examination of Takeshi Yokono, the treasurer of the payee corporation, to the extent allowed, and, if so, is such error material?

3. Are the findings of fact of the trial court so clearly erroneous as to require a setting aside on appeal?

SUMMARY OF ARGUMENT.

The trial court corectly ruled that the purported by-laws of the payee corporation were not admissible in evidence. Not having been adopted either in strict or substantial compliance with the statute, the purported by-laws were defective and invalid under territorial law. Even if this ruling were erroneous, there was no prejudice to the appellant, for the evidence clearly showed a course of corporate conduct and conduct on the part of the president and the other directors which operated to nullify any express limitation on the authority of the president.

The trial court was not in error in permitting cross-examination of Takeshi Yokono, the treasurer of the payee corporation, to the extent allowed. The direct testimony was offered to show that the president of the corporation had no authority to endorse and cash checks on which the corporation was payee, and also to show that the corporation acted as though the so-called by-laws were in force. The cross-examination was directed to the circumstances which showed authority in the president of the corporation. Under the federal rule, the right of cross-examination is not confined to the specific questions asked on direct examination but extends to the full scope of the subject matter of the examination-in-chief. The discretion allowed to the trial judge in this matter is not shown to have been abused.

The trial court found from the evidence that the appellee bank made payment to an authorized officer of the payee, and, on such finding, properly rendered

judgment for the defendant. These findings are not so clearly erroneous within the meaning of Sec. 52 (a) of the Federal Rules of Civil Procedure as to require a reversal on appeal.

ARGUMENT.

I. THE TRIAL COURT DID NOT ERR IN REFUSING TO ADMIT IN EVIDENCE THE PURPORTED BY-LAWS OF THE PAYEE CORPORATION.

The appellant, to establish the allegations of its complaint that "Anthony Yee [the president of the payee corporation] took said checks and wrongfully, and without any right, authority or permission, endorsed each thereof in blank with the name of the payee named therein," (R. 16) and, in support of its opening statement that it would show that Yee was not authorized to endorse and receive cash for these checks (R. 35, 36), offered in evidence what purported to be the by-laws of the payee corporation.

It appearing that no meeting was held of all the incorporators or of the stockholders in the manner required by territorial law (*R.L.H. 1945*, Sec. 8335), the trial court denied the offer in evidence (R. 136). The appellant assigned this ruling as error (R. 201) (Appellant's Brief, pp. 26-31).

In challenging the ruling of the trial court before this court, the appellant is controlled by the principle stated by Mr. Justice Douglas in *Palmer v. Hoffman*, 318 U.S. 109, 116; 87 L.ed. 645, 651 (1942):

“* * * He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted. * * *”

Also to the same effect, *United States v. Crescent Amusement Company*, 323 U.S. 173, 79 L.ed. 160 (1944).

This burden the appellant fails to assume, it merely being stated in the opening brief that “this ruling constituted reversible error in the face of the foregoing facts” (Appellant’s Brief, p. 31). It is submitted that the “foregoing facts” spell out no showing of prejudice, and for this reason, if for no other, the trial court is to be upheld in its ruling.

But beyond that, the evidence clearly shows that there was actually no prejudice to the appellant in the ruling denying the admission of the purported by-laws. The purpose of the offer was to prove that the president had no authority to endorse and receive cash for checks on which the corporation was named as payee. This contention would appear to be supported by that portion of Section 1 of Article V of the rejected document (R. 118) which states that “* * * Except as otherwise provided by these by-laws or by law, all checks * * * shall be signed, executed and delivered by the President or a Vice-President and by the Treasurer or the Secretary; * * *”

However, that section also contains a proviso reading: “* * * the Board of Directors may from time to time by resolution authorize checks, * * * endorsements, * * * or writings of any nature to be signed, executed and delivered by such officers, agents or em-

ployees of the corporation, or any one of them, in such manner as may be determined by the Board of Directors." (R. 118). The so-called by-laws also provide that "The President * * * shall exercise general supervision over the business of the corporation and over its several officers, agents and employees, * * *" (R. 116).

The evidence shows a course of conduct by the directors and officers whereby all transactions involving financial corporations were turned over to the president (R. 97-100, 161, 162). It shows that the treasurer consented to the president handling these details (R. 97), and that the other directors completely acquiesced. In addition, the evidence shows clearly that the corporation was most informally and irregularly operated. Apparently, no resolutions of any kind were ever adopted on any subject (R. 99). The treasurer did not keep the books of account, none being kept until June or July of the year following incorporation and after defalcation by the president (R. 148). The secretary, who was related to the president, was inactive and was unable to do any work, relying on the others to do so, and, in fact, kept no records of any corporate meetings or transactions, and, in general, did not know what the corporation was doing (R. 141, 142).

While there was no formal resolution of the board of directors authorizing the president to sign, execute and deliver checks or other separate documents, the evidence clearly shows that the president did so with the knowledge and without the objection of the officers

and directors, and did so over a period of eight or nine months, which, in effect, nullified the by-laws and made them irrelevant. *Sferlazzo v. Oliphant*, 24 Cal. A. 81, 140 Pac. 289 (1914); *Schwehm v. Chelton Trust Co.*, 257 Pa. 76, 101 Atl. 93 (1917).

In *Produce Exch. Trust Co. v. Bieberbach*, 176 Mass. 577, 58 N.E. 162 (1900), an action was brought against a corporation on three promissory notes. The trial court excluded the by-laws of the company which required "checks or other instruments for the payment of money" to be signed by the president and countersigned by the treasurer. On appeal, the defendant contended that this ruling was erroneous. The court said:

"* * * While the by-laws gave authority to certain officers, the corporation could also confer the power to issue its notes in other ways. As the plaintiff relied wholly upon the fact that the corporation had been accustomed to recognize and pay notes made like those in suit, it was immaterial that the by-laws provided that notes should be made in some other manner. The defendants were not harmed by the exclusion of this evidence. The existence of such a by-law could not affect the rights of the plaintiff as the holder of a note signed by the officers within the apparent scope of the power which the corporation held them out as having, by paying notes signed like those in suit." (58 N.E. 165).

The ruling was a correct one in any event, since the proffered exhibit did not constitute corporate by-laws under the law of the Territory of Hawaii. The examination of Yokono, the treasurer and one of the incor-

porators who was called upon to identify the document, as well as the testimony of Herbert K. H. Lee, attorney, draftsman and signatory of the Articles of Association, reveal the following facts with respect to the purported by-laws. After consultation with Yee who was described as the "prime mover" in the organization (R. 109), Attorney Lee drafted the Articles and by-laws, and turned them over to Yee (R. 109). An informal meeting without call was held, Anthony Yee, Fred Shintaku, Kay Pang and Takeshi Yokono being the only persons in attendance (R. 89). The Articles and by-laws were read and signed by those present (R. 89). This occurred on November 23, 1948 (R. 87). They were then returned to Lee who submitted the Articles for filing with the Territorial Treasurer (R. 110). Because of the failure to have five incorporators, as required by territorial law, the Treasurer returned the Articles to Lee who then signed them as the fifth incorporator and resubmitted them for filing on December 7, 1948, when the corporation came into existence (R. 110, 111, 113). The by-laws were never signed by Lee (R. 127). The original signed document offered in evidence was taken from the files of Lee, he being ignorant as to whether other signed copies were extant or where they might be (R. 127, 128, 129). The secretary of the corporation apparently never had a certified copy of the same in the corporate files available for the inspection of stockholders as required by territorial statute (R. 128, 129).

By Sec. 8335 *R.L.H.* 1945 (set out in Appellant's Brief as Appendix 1, p. 46), by-laws of a corporation

may be adopted at a meeting of stockholders duly called by the holders of not less than a majority of the voting stock outstanding. The section provides that the notice of the meeting shall state that a purpose of the meeting is to adopt by-laws. There is also a proviso in that section that “* * * by-laws may be adopted at the incorporation of a corporation by the signers of the articles of association; * * *”

As a matter of common law, the power to adopt by-laws is a power basically of the stockholders and not of the officers or directors. *Fletcher on Corporations*, Permanent Ed., Sec. 4172; *Canairo v. Serrao*, 11 Haw. 22 (1897). This principle has, in fact, been incorporated into *Section 8335* which specifically and in detail sets up the procedural steps to be followed by stockholders in order to adopt, amend or repeal the by-laws. This is the essence of *Section 8335*. Only by a supplementary proviso are incorporators permitted to adopt by-laws for a corporation.

Because by-laws constitute the controlling internal law governing a corporation, its stockholders, directors and officers, the adoption of by-laws is not a casual procedure. The statutory requirements must be met. The evidence clearly shows that the formal procedure set out by statute was not followed by the stockholders or incorporators. The only action of the incorporators to adopt by-laws was taken at a meeting held some two weeks prior to incorporation. Absolutely nothing was done “at the time of” or subsequent to incorporation to validate this action. Only four of the five incorporators signatory to the articles

attended a meeting which was not formally called but was merely an informal get-together. Only at this meeting were the by-laws discussed, and only four of the five incorporators accepted them. The fifth, a dummy incorporator, at most "approved" them by "implication" (R. 111). No corporate record was kept of the incorporators' meeting (R. 142). As found by the trial court (R. 136), no action was subsequently taken by the incorporators, the directors or the stockholders to adopt this pre-incorporation action. No certified copy was kept by the corporation secretary as required by Section 8335. The general operation of the corporation was without regard to the by-laws and at all times in violation of their provisions. In any event, under the Hawaiian statute,¹ persons dealing with the corporation are not charged with constructive notice of the by-laws, and there is no contention or proof that appellee had actual notice of such by-laws.

It is, therefore, submitted that the ruling of the trial court was not in error and should be upheld by this court for the reasons, first, that there was no error in the ruling, and secondly, if there was error, such error was not prejudicial to the appellant.

¹Sec. 8335, Revised Laws of Hawaii 1945; Appellant's Brief, Appendix 1.

II. THE TRIAL COURT DID NOT ERR IN PERMITTING CROSS-EXAMINATION OF TAKESHI YOKONO, THE TREASURER OF THE PAYEE CORPORATION.

Takeshi Yokono, treasurer of the payee corporation, took the stand as a witness of the appellant, who now claims that he was called merely to lay a foundation for the introduction of the corporate payee's by-laws (Appellant's Brief, p. 40). The purpose of calling this witness and the attempted introduction of the by-laws was obviously to prove the allegation contained in the appellant's pleading and the claims set forth in the opening statement that the president of the corporation was without authority to endorse and cash the checks made payable to the corporation (R. 16, 35, 36).

The trial court, during the course of cross-examination, permitted inquiry into the operation of the corporation insofar as the inquiries showed the authority permitted the president and the corporate approval of his acts. The appellant objected to this cross-examination as being beyond the scope of the direct examination, and, on being over-ruled by the trial court, claims error in the ruling.

It is stated by the appellant that the settled rule of the federal courts is that cross-examination is to be limited to matters embraced in the examination-in-chief only (Appellant's Brief, pp. 40, 41). However, the appellant has overlooked the equally important principle that it is within the discretionary power of the trial judge to allow exceptions to this rule. This rule was clearly stated by Chief Justice Gibson, the progenitor of the so-called federal rule in the case of

Ellmaker v. Buckley, 16 S&R 72, 77 (Pa. 1827), where he explains cross-examination to be subject to enlargement in the trial court's discretion, in the following language:

"* * * and for myself, I would not without further consideration pronounce the exercise of the discretion, depending as it does on circumstances which cannot be fully made to appear in a court of error, to be a subject of a bill of exceptions."

The discretionary power of the trial court to control the extent of cross-examination is recognized in various decisions of the Supreme Court.² The following language has been used in leading cases:

"* * * Still, where the cross-examination is directed to matters not inquired about in the principal examination, its course and extent is very largely subject to the control of the court in the exercise of a sound discretion; and the exercise of that discretion is not reviewable on a writ of error. * * *" *Rea v. Missouri*, 17 Wall. 532, 21 L.ed. 707, 709 (1873).

"* * * judgment will not be reversed merely because it appears that the rule limiting the cross-examination to the matters opened by the examination in chief was applied and enforced; but those cases do not decide the converse of the proposition, nor is attention called to any case where it is held that the judgment will be re-

²Wigmore points out the fallacy in limiting cross-examination on any theory that leading questions could be improperly used as urged by appellant. (Appellant's Brief, p. 44.)

Wigmore on Evidence (3rd Ed.) Sec. 1887, pp. 538, 539.

versed because the court trying the issue of fact relaxed the rule and allowed the cross-examination to extend to other matters pertinent to the issue." *Wills v. Russell*, 100 U.S. 621, 625; 25 L.ed. 607, 608 (1880).

"Walter was called as a witness by plaintiff; testified that such reconveyance was the only one he had made of lot 10—the lot in controversy. Thereupon defendant's counsel cross-examined him at great length, against the objection of plaintiffs, regarding his business of buying and selling real estate and the extent of it and character. The ruling of the court permitting the cross-examination is assigned as error. We see no error in it. The question of plaintiffs' counsel was a general one and opened many things to particular inquiry. The extent and manner of that inquiry was necessarily within the discretion of the court, even though it extended to matters not connected with the examination-in-chief. * * *" *Davis v. Coblens*, 174 U.S. 719, 726, 43 L.ed. 1147, 1150 (1898).

Recognition that the extent of cross-examination rests in the sound discretion of the trial court is reiterated in *Alford v. United States*, 282 U.S. 687, 75 L.ed. 624 (1930); *District of Columbia v. Clawans*, 300 U.S. 617, 81 L.ed. 843 (1936); *Glasser v. United States*, 315 U.S. 60, 86 L.ed. 680 (1941).

To evaluate properly the cases in which the so-called federal rule was applied to limit cross-examination to matters introduced in direct examination, consideration must be given to the manner in which the question arose in the appellate court. Where the trial

judge has refused to permit a requested extension of cross-examination, the appellate court has generally upheld the trial court by the application of the limiting rule because the judge had in his discretion in the exercise of that rule so limited the examination. Where, however, the trial judge has in his discretion permitted reasonable latitude in cross-examination, reversal is had only where it can be said that the judge abused his discretion, and the complaining party was prejudiced thereby.

Thus, this court in *Alpin v. United States*, 41 F. (2d) 495 (9th Cir. 1930), (Appellant's Brief, p. 41), upheld the District Court which had excluded certain questions asked on cross-examination. There was obviously no error committed by the trial court in so ruling, and this action was compatible with the principles of the Supreme Court decisions previously enunciated, even though only the limiting rule and not the discretionary rule was invoked.

Likewise, in *Chevillard v. United States*, 155 F. (2d) 929 (9th Cir. 1946), (Appellant's Brief, p. 41), the trial court had limited cross-examination and properly so. This court again upheld the trial court on the basis that the federal rule was sufficient to justify such a ruling.

Such being the applicable law, in order, therefore, for the trial court in the instant case to be reversed for error in its ruling, it is necessary for the appellant to show (1) that the cross-examination went beyond the scope of the direct examination; (2) that the trial court abused its discretion in permitting the

latitude of cross-examination; and (3) that the appellant was prejudiced by such ruling.

It is recognized that under the federal rule the right of cross-examination is not confined to specific questions of direct examinations but extends to the full scope of the subject matter of the examination-in-chief. Such has been held by this court in *Hyland v. Millers Nat. Ins. Co.*, 58 F. (2d) 1003, aff'd, 91 F. (2d) 735 (9th Cir. 1937), as well as by the courts in other circuits. *Union Trust Co. v. Woodrow Mfg. Co.*, 63 F. (2d) 602 (8th Cir. 1933); *Owl Creek Coal Co. v. Goleb*, 232 Fed. 445 (8th Cir. 1916); *DeWitt v. Skinner*, 232 Fed. 443 (8th Cir. 1916).

What was the scope of the direct examination of Takeshi Yokono? He testified that he was connected with the payee corporation during its existence from November 1948 to December 1949, and that it was a Hawaiian corporation of which he was one of the incorporators (R. 85). The witness identified the purported by-laws and his signature on them (R. 85-86). He testified as to the place of the signing and identified the other signatures (R. 86). After counsel stated that he would show by the testimony of the witness that the purported by-laws constituted the official record of the corporation, the witness testified as to the date of signature (R. 87) and that *they were "the By-Laws under which the corporation acted"* (R. 85-88). [Italics supplied.]

In other words, the corporation acted as though these were the by-laws. As stated by appellant:

“* * * Appellant had further bolstered its argument that these were the authentic By-Laws by making reference to the fact that, even if not properly adopted, these By-Laws had been acted upon as if they were the By-Laws of Waipahu Auto Exchange, Limited. In doing so, *appellant was referring to the testimony of Takeshi Yokono that these were the By-Laws under which the corporation acted* (R. 88).” [Italics supplied.] (Appellant’s Brief, pp. 30-31).

The obvious purpose of the introduction of the purported by-laws and the evidence that the corporation had acted as though these had been legally adopted was to show that the president of the payee corporation had no authority to endorse and cash checks on behalf of the corporation (R. 4, 16, 35, 36). The cross-examination was directed solely to the question of the authority of the president as conferred by the custom of the corporation and by the action or inaction of its officers and directors.

It is submitted that where a witness testifies that a certain document constitutes the by-laws under which the corporation acted, and those by-laws purport to limit the authority of the president, it is not beyond the scope of the direct examination to inquire on cross-examination as to the actual, implied or apparent authority of the president as granted by the actual operations of the corporation. Certainly, cross-examination showing that the purported by-laws were not, in fact, the “functional by-laws” of the company is within the scope of a direct examination in which

the witness testifies that they were, in fact, the functional or operative by-laws.

The extent of cross-examination is a matter largely within the discretion of the trial judge. The language of the Supreme Court in *Davis v. Coblens*, 174 U.S. 719, 726, 43 L.ed. 1147, 1150 (1898), previously referred to, may again be recited:

“* * * The question of plaintiffs’ counsel was a general one and opened many things to particular inquiry. The extent and manner of that inquiry was necessarily within the discretion of the court, even though it extended to matters not connected with the examination-in-chief. * * *”

In the instant case, the questions of plaintiff’s counsel: “Were you connected with the Waipahu Auto Exchange, Limited, during its corporate existence?” (R. 85); “Were these the by-laws under which the corporation acted?” (R. 88) were general questions which similarly opened many things to particular inquiry. As such, it is submitted that the extent and manner of that inquiry was necessarily within the discretion of the court and no abuse of discretion can be found in the court’s rulings.

III. THE TRIAL COURT’S FINDINGS THAT PAYMENT WAS MADE BY THE APPELLEE BANK TO AN AUTHORIZED OFFICER OF THE CORPORATE PAYEE SHOULD NOT BE SET ASIDE ON APPEAL.

That payment to an authorized agent of the payee is a complete defense to an action brought by a de-

positor against a bank on a check claimed to have been wrongfully paid is undisputed. 9 *C.J.S.*, Banks and Banking, Secs. 352, 353; 40 *Am. Jur.*, Payment, Sec. 24; Appellant's Brief, pp. 16, 18-23.

The trial court found from the evidence that the bank made payment to an authorized agent of the payee, and, in accordance with the principle of law stated above, rendered judgment for the defendant. Since there is no dispute as to the applicable rule of law, the only question presented is whether the court's findings of fact are so clearly erroneous within the meaning of Sec. 52(a) of the Federal Rules of Civil Procedure as to require a setting aside on appeal. The Supreme Court in *United States v. United States Gypsum Co.*, 333 U.S. 364, 92 L.ed. 746, 765, 766 (1947), interpreted the provisions of Rule 52(a) as follows:

“* * * That rule prescribes that findings of fact in actions tried without a jury ‘shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.’ It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. Since judicial review of findings of trial courts does not have the statutory or constitutional limitations on judicial review of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where ‘clearly erroneous.’ The practice in equity prior to the present Rules of Civil Procedure was that *the findings of the trial court, when dependent upon oral testimony where*

the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." [Italics supplied.]

This court in *Smyth v. Barneson*, 181 F. (2d) 143 (9th Cir. 1950), has construed the rule to mean that if a trial judge's findings are based upon oral testimony *the appellate court "may disturb that finding only in the most unusual circumstances"*.

It is submitted that the trial court's findings of fact to the effect that payment was made by the bank to an authorized officer of the payee corporation are amply supported by the evidence and should not be disturbed. The evidence supporting particular findings of the trial court will be considered separately in the discussion which follows:

- A. The trial court correctly found that Anthony Yee, by virtue of the fact that he was president of the corporation, had prima facie authority to endorse negotiable instruments and to receive payment therefor.**

It is an undisputed fact that Anthony Yee was president of Waipahu Auto Exchange, Limited, the corporation named as payee in the checks involved in this action. The trial court found "That by virtue of this office as president of Waipahu Auto Exchange, Limited, Anthony Yee had *prima facie* authority to endorse negotiable paper and receive payment therefor on behalf of said corporation" (R. 24).

The trial court was correct in reaching this conclusion. Although the cases are not in complete agreement, the weight of authority supports the view that the president of a corporation, solely by virtue of his office as president, has *prima facie* authority to endorse negotiable instruments and to receive payment therefor.

The law on this subject is clearly and succinctly stated in 2 *Fletcher, Cyc.*, Corps., Sec. 601, as follows:

“* * * A few early decisions deny the power of the president to indorse negotiable paper, but the later decisions hold that there is implied authority, or at least a presumption of authority to indorse such paper, not only in case of presidents of banks, but also in case of the presidents of ordinary trading corporations, although no by-law or resolution is shown giving them such authority; accordingly, an innocent person taking such paper in due course may stand on the presumption that the officer indorsing the instrument had the authority to do so, until such presumption is rebutted by competent evidence, and some authorities go so far as to hold that the *prima facie* presumption that the president of a manufacturing or trading corporation is authorized to discount and transfer, in the course of its business, negotiable instruments payable to or held by the corporation, is conclusive in favor of a holder of the instrument in due course. * * *”

In *Schwehm v. Cheltenham Trust Co.*, 257 Pa. 76, 101 Atl. 93 (1917), the plaintiff drew a check on the defendant bank in the sum of \$5,002 payable to the Federal Loan Society. The check, endorsed “Federal

Loan Society, H. W. Stoll, President, Jos. R. Friedman," was cashed and subsequently charged against the plaintiff's account. Plaintiff then brought suit against the defendant bank claiming that Stoll, the payee's president, had no authority to endorse the check. Under the by-laws of the Federal Loan Society the president was general manager of the company and had general supervision of the other officers.³ However, it did not appear that the president had been given any specific authority in regard to financial transactions or signing or endorsing commercial paper. On appeal, the plaintiff contended that the power of the president was limited by a provision of the by-laws which required that all checks were to be signed by the treasurer and countersigned by the president. However, the court said that this provision referred only to instruments on which the corporation was maker and not to instruments where the corporation was payee and that, therefore, it did not limit the power of the president as to the latter. In holding that the president had authority to endorse the check in question and to receive payment therefor, the court said:

"Under the by-laws, as noted above, the president was made the 'chief executive officer' and the general and active manager of the business of the company. He had control over every other officer of the company, and power to direct the disbursement of its funds. This authority was ample to authorize him to accept money paid to

³Attention is directed to the fact that under the purported by-laws of the payee corporation the president had general supervision over the business of the corporation and its officers. (R. 116).

the company, whether in cash or in the form of a check payable to the order of the company. If he misappropriated funds paid in good faith to him as the representative of the company, the loss must be that of the corporation that authorized him to act, and held him out to the public as its chief officer and general agent. As the power was delegated to the president in the by-laws, there is no question here, as to acquiescence, by the board of directors. No action upon the part of the directors was necessary. But even where his authority comes from the directors, the president of a bank may indorse bills or notes payable to it. And it would seem that he has an implied power to indorse and transfer its negotiable paper. 1 Daniels, Neg. Inst. §394." (101 Atl. 94.)

Accordingly, the court held that "payment of the check to the president of the company was payment to the corporation."

See also *Cardwell v. Garrison*, 179 N.C. 476, 103 S.E. 3 (1920); *Sawyer v. Rochester Trust Co.*, 45 F. (2d) 867 (D.C., N.H. 1931); *Merrill v. Hurley*, 6 S.D. 592, 62 N. W. 958 (1895); *Citizens' State Bank v. Skeffington*, 50 N.D. 494, 196 N.W. 953 (1924); *Swedish-American Bank v. Koebernick*, 136 Wis. 473, 117 N.W. 1020 (1908); *California Standard Finance Corp. v. J. D. Millar R. Co.*, 118 Cal. App. 185, 5 P. (2d) 41 (1931); *Jones v. Stoddart*, 8 Idaho 210, 67 Pac. 650 (1902); *American Exchange Nat. Bank v. Oregon Pottery Co.*, 55 Fed. 265 (C.C., Ore. 1892); *Citizens' Nat. Bank of Tacoma v. Wintler*, 14 Wash. 558, 45 Pac. 38 (1896); *Weaver v. Henderson*, 206 Ala. 529, 91 So. 313 (1921).

In several cases the courts, while recognizing that a presumption of authority exists, have held that the rule does not apply where the president uses the funds obtained on his signature or endorsement for his own purposes. *Wen Kroy Realty Co. v. Public Nat. Bank & Trust Co.*, 260 N.Y. 84, 183 N.E. 73 (1932); *Bank of Benson v. Gordon*, 103 Neb. 508, 172 N.W. 367 (1919). This distinction is not applicable to the case at bar for there is no evidence in the record that the president of the payee corporation used the funds he obtained from cashing the corporate checks for his own purposes. On the contrary, the complete acquiescence of the directors and stockholders to the president's control of the financial affairs of the corporation gives rise to the irresistible inference that Anthony Yee was, in fact, sharing the profits with the stockholders, or using the money for the benefit of the corporation.

Since there is no evidence in the record showing the use to which the proceeds were put or in any manner rebutting this presumption of authority on the part of the president of the payee corporation, the trial judge was required to infer that such authority actually existed, in accordance with the general rule as to presumptions. 20 *Am. Jur., Evidence*, Sec. 166; *Carey v. Hawaiian Lumber Mills Co., Ltd.*, 21 Haw. 506, 511 (1913); *State v. Northwestern Nat. Bank*, 219 Minn. 471, 18 N.W. (2d) 569, 580 (1945).

B. The trial court's finding that Anthony Yee had implied authority to endorse the checks and to receive payment therefor on behalf of the corporate payee is supported by substantial evidence and should be sustained.

(1) *Law of Implied Authority.* Counsel for appellant has accurately stated the law on implied authority as follows:

“Implied authority is a form of actual authority implied from powers expressly given, or from the circumstances of the case. * * *” (Appellant's Brief, p. 330).

Appellee is in full agreement with this statement of the law but relies mainly upon that facet of the rule which finds an implication of authority “*from the circumstances of the case*”, rather than “*from powers expressly given*”. Numerous cases have held that, although the president of a corporation may not be expressly authorized to execute or endorse negotiable instruments and to receive payment therefor, authority may be implied from a course of conduct, usage, or custom of the business. Implied authority may exist even though a by-law expressly denies such authority. And where the directors relinquish to the president the entire management and control over the corporation's business or financial affairs, authority to endorse negotiable instruments and to receive payment is readily implied. Many decisions may be found which are based on facts very similar to those of the case at bar.

In *Chestnut St. Trust & Savings Fund Co. v. Record Pub. Co.*, 227 Pa. 235, 75 Atl. 1067 (1910), the president of a corporation delivered to the plaintiff

a promissory note for \$3,000 which had been signed by him as president. He received in return a check from the plaintiff which he promptly cashed for his own purposes. When demand was made on the note, the corporation refused payment on the ground that its president had no authority to execute the note, and that the company had derived no benefit therefrom. The evidence showed that the company was a "one-man" affair, and that the president managed and controlled all of its business and finances, without instructions from or reference to the officers or stockholders. Neither stockholders nor directors held meetings except for the purpose of organization, and, once a year, to elect officers. The directors abandoned to the president all of their active duties. They did nothing to limit or define his powers, or to ascertain how he was managing the affairs of the company. It also appeared that it was customary for the president to mix the money of the corporation with his personal account.

The question presented on appeal was phrased by the court as follows:

"* * * Where from its inception, the stockholders and directors of a corporation completely abandon to the president the entire management and control over its affairs, is the corporation liable on its promissory note given by the president without any express authority from the board of directors, or subsequent ratification where he uses the proceeds for his own purposes, and the corporation derives no benefit therefrom; and where the note is given to one paying full

value without any knowledge of a wrongful intention on the part of such president? * * *” (75 Atl. 1067).

The court held in the affirmative, stating its decision as follows:

“* * * Where the stockholders and directors turn over to an officer the full and absolute management of all corporation affairs, and permit him to exercise unrestrained control for a long course of time without instructions from or reference to any other authority, prima facie the officer so intrusted may be taken to have power to do any act which the directors could authorize or ratify. In the recent case of First National Bank v. Colonial Hotel Company (not yet officially reported) 75 Atl. 412, it was held that a general and universal course of dealing by a corporation through a particular officer will give rise to an implied power to act and bind the corporation, and that such implied power will protect one so dealing with the corporation for the first time, even though such person had no previous knowledge of the manner in which the corporation was being conducted. In the present instance, the evidence as to the whole course of conduct of the officers and stockholders of the publishing company in allowing Singerly absolute control was sufficient to justify a finding that he was thereby vested with power to borrow money on the note of the company. If he had such authority he committed no wrong in its exercise, and if, after getting the money, he misappropriated it, the loss falls upon the publishing company, and not upon the trust company which

made the loan without the knowledge of any wicked intention on the part of Singerly. * * *” (75 Atl. 1068, 1069).

It was held in *Fayette Nat. Bank v. Meyers*, 211 Ky. 185, 277 S.W. 292 (1925), that where it was established that it was customary for the president of a corporation, who was also its fiscal agent and general manager, to endorse all checks payable to the corporation and to deposit them to his individual credit, the corporation was bound by such endorsement. The court said:

“* * * Craft, as president and fiscal agent of the company, acting and speaking for it in every business relation, had a right to indorse the check of Meyers as fiscal agent of the company in the same way and manner he had indorsed all other checks of the company and the bank with which he had and kept an account, and which had been receiving other checks made to the company and indorsed by Craft as fiscal agent, had a right to accept the check in question, indorsed by Craft as fiscal agent, and to place the funds to the same account as with other checks, in accordance with the custom of business established between the oil company and the bank, as was done. * * *” (277 S.W. 293).

In *Harris v. H. C. Talton Wholesale Grocery Co.*, 11 La. App. 331, 123 So. 480 (1929), a corporation was sued upon a promissory note which had been signed by the general manager under the corporation's stamp. The stock of the corporation was held by four shareholders who were also the directors of

the corporation. It was contended by the defendant that McCrary, the general manager, had no authority from the board of directors to execute the note. The evidence showed that as a matter of custom, habit, and practice, the board of directors, as such, took no stock or interest in conducting the affairs of the corporation. Only one meeting a year was held, and that for the purpose only of electing officers. Talton, as president, and McCrary, as general manager, the chief stockholders, were intrusted with the entire management of the concern. McCrary, as general manager, stayed in the office, did all the buying, conducted the business generally, employed the help with little if any advice or assistance from the others, signed notes evidencing the indebtedness of the corporation, and signed checks for and in its name. The board of directors was never called together to authorize or ratify any business transaction. Everything was left to Talton and McCrary. The court held that the corporation could not raise the defense that McCrary had no authority to execute the promissory note. It observed:

“True, the board of directors did not by formal action authorize the making of the note by McCrary, the general manager. But it had intrusted the entire management of the concern to McCrary, who signed other notes and all checks for it without express authority, and none of his acts were ever repudiated or even questioned. By custom and practice, all similar matters were left in his hands. * * *

“It is not always necessary that the acts of an officer of a corporation * * * be formally author-

ized by its board of directors. An officer, such as the general manager, may lawfully bind a corporation where similar acts of his have been approved and sanctioned by the stockholders and members of the board as a general practice, custom, and policy. The authority of its officers often and frequently depends upon the course of dealings which the corporation or its directors have sanctioned. * * *” (123 So. 482).

In *Sferlazzo v. Oliphant*, 24 Cal. A. 81, 140 Pac. 289 (1914), an action was brought upon a promissory note executed by the defendant to the corporation which note was endorsed as follows: “F. P. Cutting Company by F. P. Cutting, President.” The evidence showed that F. P. Cutting was at the time of the endorsement the president and general manager of the F. P. Cutting Company. The plaintiff offered evidence to show the custom of the company regarding the endorsement of checks, notes and similar instruments during the three years that F. P. Cutting had been president of the company. Counsel for defendant objected on the ground that a by-law of the corporation required the president to obtain the approval of the directors before signing any instruments. The trial court sustained the objection. The appellate court reversed the trial court, stating the law as follows:

“* * * we think the rule to be well settled that the president and general manager of a going business concern may, by the custom and usage of the corporation, be invested with power to do a variety of things necessary to be done

by some particular officer or agent in the usual and ordinary course of business. The indorsement and transfer of commercial paper and choses in action comes easily within the class of powers with which the president and general manager of a corporation may be shown to have been invested by proof of the usage of its business. [Authorities deleted]

“Nor do we think that the by-law urged here in opposition to the proof of such usage is to be construed as preventing the admission of such proof. Its language is permissive, not restrictive. It assumes to expressly authorize the president to sign all contracts and other instruments in writing which have been first approved by the board of directors; but the by-law does not indicate how that approval may be manifested; nor does it forbid the giving of larger powers in such matters to the active head of the concern. It is not, therefore, to be held to be a limitation upon the power of the directors of the corporation to invest its president and general manager with authority to do things of the kind in question in the ordinary and usual course of its business, and to signify their approval of his acts by the custom and usage of the corporation in the conduct of its affairs [Authorities deleted]; * * *” (140 Pac. 290).

To the same effect, see *Africa v. Duluth News-Tribune Co.*, 82 Minn. 283, 84 N.W. 1019 (1901); *G. V. B. Min. Co. v. First Nat. Bank*, 95 Fed. 23 (9th Cir. 1899) (discussed *infra*); *Morten v. Niagara Falls Paper Manuf'g Co.*, 122 N.Y. 165, 25 N.E. 303, 306 (1890).

(2) *The Evidence.* The trial court's finding that Anthony Yee, president of the corporate payee, had implied authority to endorse the checks and to receive payment therefor is supported by substantial evidence. The corporation, which existed only for a few months (R. 85), was loosely and defectively organized, and its affairs conducted in a most informal and irregular manner. Its four stockholders, who were also its directors and officers, included Anthony Yee, Fred H. Shintaku, Kay Y. K. Pang and Takeshi Yokono (R. 104, 105, 107). Herbert K. H. Lee, the attorney who handled the incorporation of the company, was also named as a director (R. 104). The latter testified, however, that he was asked to be a "dummy director just for the purpose of compliance with the statute" (R. 111). Kay Y. K. Pang may also be characterized as a "dummy director" for she had no knowledge of what the corporation was doing (R. 142). Some time before incorporation, the stockholders assembled to adopt by-laws. No formal notice was given of this meeting (R. 89); it was merely an informal "get-together" called by Anthony Yee (R. 89). No minutes or records of any kind were kept of the meeting (R. 89). Evidently, no other meetings were held after this organizational meeting, for Herbert K. H. Lee, one of the directors, did not receive notice of any meetings (R. 131), and no minutes or records were kept of any meetings (R. 142). Although Yokono was the treasurer of the corporation, it is apparent from his confused testimony and lack of familiarity with the corporation's financial affairs

that he had abandoned his duties to someone else. Yokono did not receive a salary from the corporation, and devoted only a limited amount of time to his duties as treasurer for he had a full-time job managing a store (R. 139). In his own words, "I just went as I pleased" (R. 139). As treasurer, Yokono kept no regular books of account until after Anthony Yee had severed his connection with the company (R. 148, 149). The few records that were kept were so confusing that Yokono was unable to ascertain "which check belonged to which deal" (R. 157). Mrs. Kay Pang, a relative of Anthony Yee (R. 141), was secretary of the corporation, but was not active in any of its affairs (R. 141). She did not keep any records of any of the meetings or of any corporate transactions (R. 142). Since she had no knowledge of what the corporation was doing, and asked the other directors to perform her duties for the reason that she was not able to do the work (R. 142), she was, in fact, a "dummy secretary".

The evidence also shows that both Yokono and Yee were mixing the accounts of the corporation with their own individual accounts (R. 174, 177, 184, 186, 187). Yokono testified that at one time when the corporation was out of funds he and Yee decided to "help the company out by financing" (R. 177). The following testimony appears on page 177 of the record:

"Q. [by Mr. Cades]. * * * You can state positively that the deposit of May 2, 1949, represented the deposit of a personal check of Anthony

Yee to the Corporation in the amount of \$3,582.78; that is right, isn't it?

A. That represented part of my money and part of his money.

Q. Part of his money and part of yours?

A. Yes.

Q. But the check was a Yee check?

A. That's right."

The same witness testified that he drew his savings out of the bank and paid Territorial Motors for a debt of the corporation (R. 174).

The testimony of Yokono and Herbert K. H. Lee shows that Anthony Yee, the president of Waipahu Auto Exchange, Limited, exercised almost complete control of the corporation's financial affairs. Yokono testified that, as treasurer of the corporation, he gave his sanction to the financial arrangements undertaken by Yee (R. 97). He stated that Yee was giving the orders as to what the arrangements should be (R. 160), and that, as a matter of fact, financial matters were "left entirely to Mr. Yee" (R. 161). The following testimony with reference to the financial dealings of the corporation appears on pages 160 and 161 of the transcript of record:

"Q. [by Mr. Cades]. So that if Anthony Yee signed the letter and made the arrangements, he made them without your approval or knowledge?

A. It seems that way. [109]

Q. You testified that you knew that he had made some arrangements with finance companies; is that right?

A. Yes.

Q. Who was giving the orders on what the arrangements should be, you or Mr. Yee?

* * * * *

The Witness. You mean the arrangements for the loans?

Mr. Cades. Arrangements with the finance companies.

A. I don't recall, but it must have been—it must have been Yee.

* * * * *

Q. Mr. Yokono, weren't the arrangements concerning the relationship or the dealings of your Company with the finance companies left entirely to Mr. Yee?

A. Yes."

The corporation was for all practical purposes a "one man affair". As stated by Mr. Herbert Lee, the corporation's attorney, Yee was the "prime mover in this organization" (R. 109). It is apparent that the directors placed absolute trust and confidence in Yee and allowed him to exercise unrestrained management of the corporation's financial affairs. Clearly implied from these broad powers was the authority to endorse checks without countersignature of any other officer and to receive payment on behalf of the payee corporation.

When the directors of the payee corporation conferred upon Yee the authority to make the arrangements with finance companies (R. 160-161), they had ample opportunity and time to inform themselves as to what these transactions involved. In a small corporation, which is informally operated, a course of dealings

of an officer, entrusted with general authority, will create implied authority to continue in that course. A cursory inquiry by the directors would have disclosed that Yee was cashing the checks of the corporation on his sole endorsement. The directors knew or should have known of this course of dealing on the part of its president. Their failure to object constituted tacit approval of his conduct.

Over a period of four months the appellant issued fourteen checks to the payee corporation by delivering them to Anthony Yee as president (R. 19), who in every case cashed them on his own endorsement. Completely satisfied that Yee had full authority to act for the payee corporation, the appellant cashed one of these checks at its office and accepted as proper the endorsement of Yee alone (R. 71). Appellant deposited the check so endorsed to its account in the appellee bank (R. 70), knowing that the check had been issued for the financing of an automobile contract (Ex. 2-A, R. 77). The purpose of depositing the check so cashed by appellant was to have a record that payment had been made to the payee corporation (R. 73). It scarcely lies in the mouth of the appellant now to contend that Yee lacked authority, as president of the payee corporation, to endorse the checks and receive payment therefor, when appellant itself, in complete reliance upon the authority of Yee, cashed a similar check and deposited it, so endorsed, as its own record of a payment to the payee corporation.

The finding of implied authority is amply supported by the record and should not be disturbed.

- C. The trial court correctly found that Anthony Yee had apparent authority to endorse the checks and to receive payment therefor on behalf of the corporate payee.

The trial court found "That the President, Anthony Yee, had apparent authority to endorse the checks in question and receive payment therefor on behalf of said corporation." (R. 24). It is submitted that this finding is based upon sound law and is amply supported by the evidence. The law of apparent authority, as applied to corporations, is clearly stated in 2 *Fletcher, Cyc., Corps.*, Secs. 449, 451, as follows:

"A corporation is subject, to the same extent as a natural person, to the general principle that one who holds out another, or allows him to appear as having authority to act, as his agent with respect to his business generally, or with respect to a particular matter, cannot, as against persons dealing with him in good faith, deny that his apparent authority is real. If a corporation, therefore, or its directors, either intentionally or negligently, clothe a particular officer or agent with an apparent authority to act for it in a particular business or transaction, and persons deal with him in good faith, it will be bound to the same extent precisely as if such apparent authority were real.

* * *

* * * * *

"* * * apparent power may result from the corporation, having knowledge of the facts, habitually or for a long time or on numerous occasions, permitting an officer or agent to do an act ordinarily not within the powers of such an officer or agent. For instance, the treasurer of a corporation has no implied authority, as a general rule, to borrow money, or to make, accept or indorse

notes or bills, or to sell or pledge notes or other securities or to sell other property, etc. But if the corporation allows him habitually to do so, and thus clothes him with apparent authority, it is bound thereby. And the same is true of any other officer whom the stockholders or directors, by allowing him to act for the corporation in a particular way, have clothed with an apparent authority which is beyond that usually implied from his office. Thus, payment of many similar notes executed and issued by the same officers shows apparent authority of such officers to execute like notes. * * *

See also the general discussion in 2 *Am. Jur.*, Agency, Secs. 101, 102, 179.

The Hawaiian Supreme Court in *Caplan v. Hoffschlaeger and Stapenhorst*, 2 Haw. 691, 695 (1863), said:

“* * * If a person is held out to the public by the principal as having a general authority to act for and to bind him in a particular business, it would be unsound in law as in morals, * * * to allow him to set up his own secret and private instructions to the agent, limiting that authority, and thus to defeat the transactions under the agency, where the party dealing with him could have no notice of such instructions. * * *

It was held in *Platt v. Montclair Feed & Fuel Co.*, 9 N.J. Misc. 1319, 157 Atl. 553 (1931), that where the evidence showed in previous dealings between the parties negotiable paper had been endorsed in precisely the same manner by the president of a corporation,

the trial judge was justified in concluding that the president was clothed with apparent authority to make the endorsement.

The facts of *G. V. B. Min. Co. v. First Nat. Bank*, 95 Fed. 23 (9th Cir.), decided by this court as early as 1899, are analogous to the facts of the case at bar. In that case, an action was brought by a bank against a mining corporation to foreclose a mortgage for the sum of \$6,500 evidenced by two promissory notes signed by G. V. Bryan, the president of the company. The corporation denied the existence of any indebtedness whatever, apparently on the theory that the president was not authorized to execute the mortgage and promissory notes. It appeared from the evidence that Bryan and Venable were owners of a group of mines and kept an account with the plaintiff bank in the name of "G. V. Bryan, Superintendent". In February, 1891, G. V. B. Mining Company was incorporated, Bryan and Venable receiving the bulk of the stock. A small number of shares was given to several other persons to qualify them to act as directors of the corporation. Only two meetings were held by the stockholders; both of these were called shortly after incorporation to comply with the formal requirements of adopting by-laws and electing officers. In spite of the incorporation, the business between the bank and the company was conducted in the same manner as before, Bryan and Venable transacting the business of the corporation as if they were the sole owners thereof. Part of the funds obtained upon the promissory notes given by Bryan as president was expended by Bryan

and Venable upon mines which they owned individually. In the introductory part of its opinion, the court said:

“* * * The peculiar and irregular manner in which the business of the corporation, * * * was transacted, necessarily leads to many complications, * * *

“Can appellant take any advantage of * * * any of the irregular acts of its officers? Can it, after allowing Bryan and Venable to pursue the course they did, holding them out to the world as qualified to transact the business in the manner stated, be allowed to deny their authority? * * *” (p. 28).

The court then pointed out that there is a distinction between a genuine, bona fide corporation, organized for the legitimate purpose of conducting a business which requires a combination of persons and of capital, to make the business successful, and a corporation organized and conducted, as this was, in the same manner and way as if no corporation, in fact, had been formed. It observed:

“* * * We have said that Bryan and Venable constituted the corporation from the time of its organization up to, and at the time of, the execution of the notes and mortgage upon which this suit was brought, * * * In the light of the entire history of the corporation, * * * it might be, perhaps, more properly said that Bryan, until July 11, 1895, by the consent of all parties interested and concerned, and H. K. Thurber thereafter, were to all intents and purposes the G. V. B. Mining Company; that, as was said by the circuit

court, 'the so-called directors and officers in New York constituted simply the dumb machinery, entirely directed by these parties, and through whom they operated when it was necessary to invoke the legal status of the corporation to strengthen their hands or advance their objects.' " (p. 29).

The court held that Bryan, as president of the corporation, had full authority to incur the indebtedness and to execute the promissory notes in the name of the corporation. It stated its decision as follows:

"* * * Where the president of a corporation is given full power and authority to conduct and manage its business, and deal with the property and affairs of the corporation in such a manner, and for such a length of time, as to justify others with whom he transacts business in believing that he had authority to do the acts in the manner and way performed by him, the people with whom he transacts business have the right to deal with him upon the assumption that he has such authority; and the corporation, having knowledge of the exercise of such acts, and of the manner in which the corporate business was transacted, cannot thereafter, to the injury and prejudice of such parties, deny his authority, or disaffirm or set aside his acts. * * * [Authorities deleted]" (p. 30).

Appellant is in accord with the general principles of law stated above, but claims that the evidence does not show that "anyone connected with Waipahu Auto Exchange, Limited, held Anthony Yee out as having authority to cash corporate checks." (Appellant's Brief, p. 38). It is submitted that while a manifesta-

tion or "holding out" on the part of the corporation is usually required for the creation of apparent authority, this need not be in the form of a public announcement. It is sufficient if the directors of a corporation give the president such broad powers as to justify persons dealing with him to believe that he has been clothed with authority to act for the corporation. *Citizens' Bank v. Public Drug Co.*, 190 Iowa 983, 181 N.W. 274, 277 (1921).

An apparent agent is one who reasonably appears to third persons to be authorized to act as the agent of another. 2 *Am. Jur.*, Agency, Sec. 101; *Restatement*, Agency, Sec. 8. It is also sufficient if the directors permit the president of a corporation to perform a series of acts over a period of time without objecting to this course of conduct. 2 *Am. Jur.*, Agency, Sec. 102.

Appellant also insists that there is no evidence in the record showing that the corporate payee knew that its president was cashing the checks in question (Plff's. Brief, p. 38). The simple answer to this contention is that *actual* knowledge on the part of the directors of the corporation is not essential to the creation of apparent authority; it is enough if the directors, in the exercise of reasonable care, *should have known* what the agent was doing in the particular transaction. The law is clearly summarized in 2 *Am. Jur.*, Agency, Sec. 102, as follows:

"* * * Apparent authority may also be, and often is, derived from a course of dealing or from the fact that a number of acts similar to the one in question were assented to, ratified, or not dis-

avowed by the principal. The acquiescence of the principal in an extension of his authority by an agent in the transaction in question may be sufficient to create the appearance of authority in the agent to do such act; *the acquiescence in, and consequent scope of, such authority, is to be determined not only by what the principal actually does know of the acts of the agent within the employment, but also as to what he should, in the exercise of ordinary care and prudence, know the agent is doing in the agency transaction.* In such case, the appearance of authority is created because of the fact that the third person is entitled to assume that the principal is cognizant of the exercise of authority and would forbid it if it were unauthorized. As stated by the American Law Institute, except for the execution of instruments under seal, or for the conduct of transactions required by statute to be authorized in a particular way, apparent authority to do an act may be created by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes a third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him. * * *” [Italics supplied].

There is ample evidence in the record of circumstances creating apparent authority in Anthony Yee, president of the corporate payee. The action of the directors in conferring upon Anthony Yee the general authority to handle the financial arrangements for the corporation (R. 160, 161) was a manifestation to third parties that Yee had broad powers. In the exercise of these powers Yee assumed full control and manage-

ment of the corporation's financial affairs. No objection was made by the directors to this course of conduct on the part of Yee (R. 97, 160, 161). In a closely-held corporation which does a comparatively small volume of business, the directors are under a duty to keep the business and financial affairs of the corporation under reasonable surveillance. During a priod of four months, Anthony Yee cashed thirteen checks, each being made out to the corporate payee for a sum in excess of \$1000. (Plff's. Exs. B-1-B-12; Deft. Ex. No. 2). Certainly, the directors, in the exercise of ordinary diligence, should have known what was happening to its revenue. The effect of their acquiescence in this course of conduct was to clothe the president with apparent or ostensible authority to continue in this course.

The appellant itself contributed materially towards clothing Anthony Yee in the shroud of apparent authority. Not only did it transfer possession of the checks in question to Yee, but it cashed one of these checks at its office (R. 71, Deft. Ex. No. 2) and then deposited the check so endorsed to its account in the appellee bank (R. 70). This action was a representation by the appellant to the appellee bank that Anthony Yee was authorized to endorse and cash similar checks issued by it.

The appellant finally contends that there is no evidence that the appellee bank either knew or relied upon any "holding out" by the corporation (Appellant's Brief, pp. 38, 39). It is submitted that the evidence clearly shows that the appellee bank knew that

Yee was endorsing and cashing the checks of the payee corporation over a period of several months (Plff's. Exs. B-1-B-12; Deft. Ex. No. 2). This practice on the part of Yee apparently met with no objection from the directors of the corporation, for dealings with the finance companies were "left entirely to Mr. Yee" (R. 97, 160, 161). From the very fact that the directors acquiesced in this course of conduct, the appellee bank was entitled to conclude that Anthony Yee was authorized to endorse and cash checks made out to the corporation. That the appellee bank relied upon this apparent authority is clear from its action in permitting Yee to withdraw the funds on his endorsement alone (Plff's. Exs. B-1-B-12).

Even if it be assumed, however, that the bank had no knowledge of the apparent authority in Yee, the bank is nevertheless entitled to the benefit of those facts which it would have discovered upon reasonable inquiry. *Buckley v. Lincoln Trust Co.*, 131 N.Y.S. 105 (1911); *Wilson v. Metropolitan Elev. R. Co.*, 120 N.Y. 145, 24 N.E. 384 (1890); *Hanover Nat. Bank v. American Dock & Trust Co.*, 148 N.Y. 612, 43 N.E. 72 (1896). Reasonable inquiry would have disclosed that Anthony Yee, as president of the corporation, had been entrusted by the directors with complete charge of the financial affairs of the corporation (R. 160, 161); these broad powers would have justified the inference that Yee had authority to endorse and cash the checks of the corporation.

The trial court properly found that Anthony Yee had apparent authority to endorse and cash the checks.

CONCLUSION.

For the reasons set forth above, the judgment of the District Court for the Territory of Hawaii should be affirmed.

Dated, Honolulu, T. H.,
January 31, 1951.

Respectfully submitted,
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IN THE
**United States
Court of Appeals**
For the Ninth Circuit

FEDERAL SERVICES FINANCE
CORPORATION, a Corporation,

Appellant,

vs.

BISHOP NATIONAL BANK OF HAWAII
AT HONOLULU, a Corporation,

Appellee.

Appeal from the United States District Court,
For the Territory of Hawaii

REPLY BRIEF FOR APPELLANT

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REPLY BRIEF FOR APPELLANT

Since this is a reply brief, we shall not attempt to repeat or restate the arguments already set forth in our opening brief. We deal only with new arguments advanced on behalf of the appellee in its answering brief, and with the specific matters in its brief which seem in most urgent need of correction.

First, appellant desires to comment on the Statement of Facts contained in appellee's brief. Appellee states that the president of the payee corporation (Waipahu Auto Exchange, Limited) " * * * largely managed and controlled this most informally organized and irregularly conducted corporation." (Appellee's Br. p. 3). The only record reference is to R. 160, 161, *et passim*. A glance at the specific pages of the record discloses that those pages merely estab-

lish that the president handled all dealings with finance companies. That these dealings had to do with loans on, or the discounting of, conditional sale contracts is apparent from the remainder of the questioning of Treasurer Yokono (R. 99, 100, 161). We do not find any other evidence in the record to support appellee's statement that "the president largely managed and controlled this * * * corporation." No further specific record reference is cited in support thereof, nor does appellant believe any to be available.

On the contrary, the record specifically disproves appellee's statement. Vice-President Shintaku was General Manager of the payee corporation, not Yee, who was President (R. 97). Treasurer Yokono did most of the financing, with the exception of said dealings with finance companies (R. 97). Treasurer Yokono, in his capacity as such, attended to the making of bank deposits for the payee corporation (R. 145). Treasurer Yokono and Vice-President and General Manager Shintaku together signed all the checks drawn by the payee corporation on its corporate account (R. 29-30). General Manager Shintaku was also in charge of the office of the payee corporation (R. 141).

Other statements of fact which we submit to be erroneous will be treated as they become pertinent to appellee's argument.

The following Roman numeral headings of the present reply brief are keyed to the points argued in appellee's brief.

I

The first point asserted in appellee's brief is that appellant fails to assume the burden of showing prejudice as a result of the trial court's exclusion from evidence of the payee corporation's by-laws. On page 6 of its brief appellee calls this Court's attention to page 31 of appellant's brief, wherein appellant submitted that "in the face of the foregoing facts" it was error to refuse to admit the purported

by-laws. Appellee stated that the "foregoing facts" do not indicate that appellant was injured by this ruling. A reading of the by-laws and particularly the matter quoted on pages 26-27 of our opening brief clearly shows their bearing upon the authority of the president and the prejudice resulting from the failure of the court to admit them into evidence.

Appellee next attempts to establish that appellant in fact was not prejudiced, asserting, in effect, that any provisions in the by-laws limiting the president's authority were negated by the actual corporate practice. In doing so, we submit, appellee has taken certain liberties with the evidence.

On page 7 of appellee's brief it is stated: "* * * all transactions involving financial corporations were turned over to the president (R. 97-100, 161, 162)." If by "financial corporations" it is meant to indicate that the president was authorized to do more than make the arrangements for financing conditional sale contracts with "finance companies," such as appellant, the evidence does not bear out this fact. The testimony cited in support of this conclusion goes no further than to show that which we freely admit, that Anthony Yee, with the sanction of Treasurer Yokono, was allowed to make arrangements concerning the dealings of the payee corporation with finance companies. A "finance company" is defined by Webster's *New International Dictionary*, Second Edition, Unabridged (1937), p. 948, as "a commercial credit company, or sometimes, a holding company."

The testimony of witness Yokono that Yee handled the arrangements with finance companies has here been enlarged by appellee to the statement mentioned above as to "financial corporations." This is probably not too significant in itself, but it is the beginning of a metamorphosis of this evidence finally transforming the evidence of limited financial authority of the president into statements

by appellee that "Anthony Yee, the president, exercised almost complete control of the corporation's financial affairs" (appellee's brief, p. 34); that "as a matter of fact financial matters were left entirely to Mr. Yee" (appellee's brief, p. 34); and finally that "It is apparent that the directors * * * allowed him (Yee) to exercise unrestrained management of the corporation's financial affairs" (appellee's brief, p. 35).

As indicated, appellee cites Record pages 97-100, 160-162, as its authority, pertinent portions of which are as follows:

"Q. (by Mr. Cades) Didn't Mr. Yee attend to all the financing of the Company? Wasn't that his responsibility?

A. No, I financed it mostly.

Q. You financed mostly? A. Yes.

Q. Did you ever have any dealings with any finance company?

A. (by Mr. Yokono) No.

Q. Did Mr. Yee have any dealings with finance companies?

A. Yes.

Q. Mr. Yee was not treasurer?

A. With my sanction he financed." (R. 97)

* * * * *

"Q. (by Mr. Cades) Did you ever see a letter that was written on behalf of Waipahu Auto Exchange to the Federal Services Finance providing an arrangement under which conditional sale contracts could be sold to that company? * * *

"* * * A. As far as I recall I haven't seen it.

Q. (by Mr. Cades) You haven't seen such a letter. Then you have no personal knowledge of the arrangements that existed with respect to the sale of conditional sale contracts to this finance company?

A. No.

Q. No. You have no knowledge of them?

A. Excepting from what we understood from Yee.

Q. And you depended on Yee for the making of arrangements and the carrying out of arrangements * * * with the finance company?

A. Yes. * * *

Q. (by Mr. Cades). Mr. Yokono, did you ever see a letter written to the Waipahu Auto Exchange by the Federal Services Finance and approved by the Waipahu Auto Exchange relating to arrangements for the financing of conditional sale contracts?

A. No." (R. 99-101)

Then, following testimony by Yokono and Lee, not pertinent here, the examination continues as follows:

"Q. (by Mr. Cades) : Mr. Yokono, I show you a letter addressed to Waipahu Auto Exchange from Federal Services Finance Corporation, dated March 16, 1949, and I will ask you, on the 3rd page of the letter, there is a legend 'accepted Waipahu Auto Exchange by Anthony Yee.' * * *

Q. It looks similar. Mr. Yokono, did you ever see this letter addressed to the Company of which you were treasurer before now?

A. No.

Q. You have never seen the letter? A. No.

Q. And the letter was not taken up with you? A. No.

Q. So that if Anthony Yee signed the letter and made the arrangements, he made them without your approval or knowledge?

A. It seems that way.

Q. You testified that you knew he had made some arrangements with finance companies; is that right?

A. Yes.

Q. Who was giving the orders on what the arrangements should be, you or Mr. Yee? * * *

"The Witness: You mean the arrangements for the loans?

Mr. Cades: Arrangements with the finance companies.

A. I don't recall, but it must have been — it must have been Yee. * * *

Q. Mr. Yokono, weren't the arrangements concerning

the relationship or the dealings of your Company with the finance companies left entirely to Mr. Yee?

A. Yes." (R. 159-161).

It is apparent that Treasurer Yokono and Mr. Cades were talking about commercial credit companies and not the corporate dealings with all financial institutions.

Returning to appellee's brief and reading further on pages 7-8 thereof, we come to the bold assertion:

"While there was no formal resolution of the board of directors authorizing the president to sign, execute and deliver checks or other separate documents, the evidence clearly shows that the president did so with the knowledge and without the objection of the officers and directors, and did so over a period of eight or nine months, which, in effect, nullified the by-laws and made them irrelevant."

No record references are cited in support of this assertion, and we think none are available. On the contrary, the evidence is that all checks were signed by Mr. Yokono and Mr. Shintaku in accordance with the by-laws, and not by Mr. Yee (R. 29-30). Accordingly, the cases cited on page 8 of appellee's brief are removed a considerable distance from the issues in this case.

What would appear to be another unwarranted conclusion drawn from the evidence appears at pages 9 and 11 of appellee's brief. At page 9 it is stated: "The secretary of the corporation apparently never had a certified copy of the same (the by-laws) in the corporate files available for the inspection of stockholders as required by territorial statute (R. 128, 129)," and at page 11: "No certified copy was kept by the corporation's secretary as required by section 8335."

While we do not see that failure so to do would affect the validity of the by-laws, looking at the Record to pages 128-129, which are cited as supporting those assertions, we see only testimony that Attorney Lee, the dummy incor-

porator and dummy director, prepared several copies of the by-laws, but knew nothing about the existence or whereabouts of other copies. Record references appellee did not cite show that there *was* a copy of the by-laws on file in the corporation office (R. 140-141). The record is mute as to whether or not that copy was certified.

Another statement for which we find no support in the record, and for which no record reference is cited, is set out on page 11 of appellee's brief:

"The general operation of the corporation was without regard to the by-laws and at all times in violation of their provisions."

Appellee's arguments that the by-laws were not complied with and thereby appellant was not prejudiced thereby, we submit, are based upon unwarranted inferences and misstatements of the evidence adduced. We again refer the Court to our opening brief (Part II B, pp. 26-31) which, we believe, clearly shows the prejudice to appellant by the exclusion of the by-laws, and the fact that the by-laws were validly adopted.

II

Appellant and appellee, fundamentally, are not in basic disagreement upon the law applicable with respect to the permissible scope of cross-examination. Appellee recognizes the principle that the cross-examination should be limited to the scope of the direct examination, and asserts that it is within the sound discretion of the court to determine the matters to be inquired into upon cross-examination. We do not dispute this. But in determining whether this discretion has been abused, we submit, this Court should start at the point of beginning which is the rule itself, which is, in effect, that a party calling a witness may restrict cross-examination to subjects dealt with upon direct examination and that if the opposing party desires to

examine him as to other matters he should call him as his own witness.

That is the basic proposition. In one sense, whenever a trial court, unless for exceptional reasons, departs from this rule, it is committing error. But, fortunately for litigants, not every error results in a reversal. The Supreme Court in the case of *Wills v. Russell*, 100 U.S. 621, (quoted in appellee's brief, pp. 13-14), has wisely held that unless the failure to abide by the rule has injured the complaining party in some way, the case should not be reversed. The portion of the opinion quoted in appellee's brief might lead one to draw the conclusion that the court did not recognize the rule referred to insofar as it applied to cases where the extended cross-examination was permitted rather than in cases where the rule was enforced. But that this is not the case appears from other portions of the opinion. At 100 U.S. 626, the following excerpts from the opinion appear:

"Subject to these exceptions, the general rule is, that if a party wishes to examine the witness as to other matters, he must, in general, do so by making him his own witness and calling him as such in the subsequent progress of the cause.

* * * * *

"Cases not infrequently arise where the convenience of the witness or of the court or the party producing the witness will be promoted by a relaxation of the rule, to enable the witness to be discharged from further attendance; and if the court in such a case should refuse to enforce the rule, it clearly would not be a ground of error, unless it appeared that it worked serious injury to the opposite party."

The court went on to state that there was no injury to the complaining party in that case by reason of the departure from the general practice.

Likewise, the quotation in appellee's brief, page 13, from

the decision in *Rea v. Missouri*, 17 Wall. 532, might leave the impression that the court sanctioned cross-examination beyond the scope of the direct. In that case the trial judge had permitted cross-examination on matters not brought out in the examination in chief but as to one question the judge refused to require the witness to answer a question asked by the cross-examiner after the witness had declined to do so. It was this refusal by the court which was assigned as error by the party who had been conducting the cross-examination. The Supreme Court, in holding that this was not error, commented upon the procedure in the lower court stating, at 17 Wall. 542:

“His cross-examination was very long, covering fifty pages of the printed record. It took a wide range — much wider than is allowed in United States courts in the case of an ordinary witness, where cross-examination is usually confined within the scope of the direct examination.”

And, at 17 Wall. 543, the court went on to state:

“It (the question) was on a new matter first introduced on the cross-examination, and was, in fact, cross-examination upon a cross-examination. If the court did not possess discretionary power to control such a course of examination, trials might be rendered interminable.”

In other words, the court in that case in effect was holding that if the trial judge does ignore the rule limiting cross-examination to matters brought out upon direct examination, he is not precluded from exercising his discretion to put a stop to it.

In the case now before this Court, the questions for determination, we submit, are first, whether the cross-examination of Takeshi Yokono went to matters beyond the scope of his direct examination, and, second, if it did, whether appellant was prejudiced thereby.

Appellee in its brief argues that questioning Mr. Yokono

as to the identity of the by-laws of Waipahu Auto Exchange, Ltd., and asking if the offered by-laws were the ones under which the corporation acted, permitted appellee to examine him to determine whether the corporate affairs were conducted in accordance therewith.

We submit that these are two and entirely distinct subjects. It is one thing to examine a witness to identify a document as the formal by-laws of the corporation and quite a different matter to solicit testimony as to whether in the conduct of the business of the corporation the formal by-laws were adhered to. Mr. Yokono was called as a witness by appellant for the limited purpose of establishing a document as the formal by-laws of the corporation, the formal by-laws in force during the existence of the corporate entity. He was not called, nor was he questioned by appellant, on the handling of corporate affairs. Whether the corporate affairs were handled consistent with the by-laws contained in the formal document executed by the incorporators is quite a distinct subject from that of the identity of the document containing them.

Another matter overlooked in appellee's argument is that the bulk of the cross-examination of Mr. Yokono, and the prejudicial part, if any of his examination be deemed to justify the findings based thereon, took place after the judge had made his ruling that the purported by-laws were not admissible in evidence as being the by-laws of Waipahu Auto Exchange, Ltd. As the judge in effect had ruled that these were not the by-laws, why should appellee be permitted to conduct a lengthy cross-examination of this witness in an attempt to prove that the rejected document did not truly reflect the authority of the corporate officers? In other words, appellee, having successfully convinced the trial judge that the offered document did not contain the corporate by-laws, nevertheless, asserts a right to cross-examine witness Yokono at length on the theory that the document, which is not in evidence, does not embody, as

appellee puts it (appellee's brief, p. 17) "the functional by-laws" of the company.

We submit that in view of the court's ruling on the admissibility of the purported by-laws, even on the theory embraced by appellee in its brief, it was error to permit the cross-examination. We submit further, however, that an examination of a witness to identify formal by-laws does not include within its scope the question whether the corporate officers abided by the limitations of authority contained therein in the conduct of the corporate affairs.

III

Appellee, on pages 19-20 of its brief makes a point that this Court may reverse findings of fact by a trial court only where clearly erroneous. We fully agree, but submit that such is the case here. Note that there is no problem of the credibility of witnesses and conflicting evidence. The sole problem is one of determining whether the undisputed evidence supports the trial judge's findings. But, as set out above and below, appellant takes strong issue with appellee's statements of what the evidence is.

A. Here appellee attempts to rebut appellant's arguments of law on pages 24 and 25 of appellant's brief. Appellant does not intend to restate or reargue its position at this time.

On page 24 of appellee's brief, it is stated that "On the contrary, the complete acquiescence of the directors and stockholders to the president's control of the financial affairs of the corporation gives rise to the irresistible inference that Anthony Yee was, in fact, sharing the profits with the stockholders, or using the money for the benefit of the corporation." As we must time after time note in this reply brief, the only evidence in the Record of Anthony Yee's handling financial affairs of the corporation is that which shows that he handled dealings with the finance companies (R. 97-100, 160-61). Certainly this will not support any

such finding that Anthony Yee controlled the financial affairs of the corporation or give rise to any irresistible inference that, in fact, he shared the profits with the stockholders or used the money for the benefit of the corporation.

It should be pointed out, also, that all of the cases cited as authority by appellee for its assertion that a president has *prima facie* authority to endorse negotiable instruments "and to receive payment therefor" (appellee's brief, p. 21) are distinguishable upon their facts from the instant case.

A careful reading of the decision in *Schwehm v. Cheltenham Trust Co.*, 257 Pa. 76, 101 Atl. 93, discussed in appellee's brief at pages 21-23, will show that the court based its decision upon the authority of the president as found in the by-laws, although, admittedly, there is language contrary to our contention.

None of the cases listed on page 23 of appellee's brief involve the president of a payee corporation endorsing a check and receiving cash in payment therefor and in the majority of such cases the action involved a holder suing a maker of a promissory note wherein the maker alleged irregularity in the transfer. Further, in most instances, the transfer appeared to have been made in the regular course of business of the transferor, and never does there appear any question that the corporate endorser received the consideration therefor.

B. (1) *Law of Implied Authority*

We submit that appellee's citations of law are far removed from the issues in this case, as will be demonstrated in the following section.

(2) *The Evidence*

Here, in pages 32-36 of appellee's brief, the statements of the facts, we submit, are not in accordance with the evidence.

Appellee's statement, on page 32 of its brief, that the payee corporation was loosely and defectively organized

and its affairs conducted in a most informal and irregular manner, is not supported by any record reference. The only irregularity shown was that the secretary was not able to perform her duties and asked the others to perform the work for her.

A point is attempted to be made by appellee on page 32 of its brief that no formal notice was given of the pre-incorporation meeting. This is hardly pertinent since all four interested parties attended the meeting. It follows that adequate, if not formal, notice must have been given. Further, the applicable statute, section 8335, Revised Laws of Hawaii 1945 (Appellant's opening brief, appendix 1) requires no notice or formal meeting in the case of the adoption of by-laws by the incorporators.

Appellee further states on page 32, that "evidently, no other meetings were held after this organizational meeting, for Herbert K. H. Lee, one of the directors, did not receive notice of any meetings (R. 131), and no minutes or records were kept of any meetings (R. 142)." It is not at all significant that Lee received no notice of meetings, for the Record shows that he was not a shareholder (R. 127), and he was only a dummy director (R. 111, 131). The statement that no minutes or records were kept of any meetings is not supported by the record. The cited page (R. 142) only shows that the *secretary* kept no records of any meetings or of any corporate transactions. This followed the general statements that she was an inactive secretary—was not able to do the work, and asked the others to do all the work for her.

There is no basis for the statement that Treasurer Yokono "abandoned his duties to someone else" (appellee's brief, p. 33). On the contrary, his testimony is undisputed that he made the bank deposits for Waipahu Auto Exchange (R. 144-145). Likewise, although he did not actually write up the books, he kept the "datas" (R. 148). That it was understood at the trial that this meant the informal books

and records, such as sales records, bank records and simple bookkeeping forms, is apparent from the colloquies between Mr. Cades and Treasurer Yokono on pages 149, 154, 155, 157 and 158 of the Record. The formal books, in the words of Mr. Cades, were written up "after the Yee defalcation was discovered" (R. 148), which is apparently the reason why Yokono then was "in doubt as to which check belonged to which deal (R. 157)." Likewise Treasurer Yokono signed and Vice-President and General Manager Shintaku co-signed all corporate checks (R. 29-30).

On pages 33 of its brief, appellee states that "the evidence also shows that both Yokono and Yee were mixing the accounts of the corporation with their own individual accounts," citing R. 174, 177, 184, 186, and 187. Again the statement is inaccurate for all that can be gleaned from those pages of testimony, is that on one occasion Yokono, alone, and on another occasion, Yokono, together with Yee, advanced personal funds to the corporation as a loan.

Turning to page 34 of appellee's brief, it is interesting to note that the same and only evidence already discussed pertaining to the dealings of Yee with the finance companies has at this point become first, "Anthony Yee, the president, exercised almost complete control of the corporation's *financial affairs*," and next, "as a matter of fact *financial matters* were left entirely to Mr. Yee." (emphasis added.) Thus the metamorphosis referred to on page 3 of this reply brief has now become complete. The simple evidence of arrangements for the sale of conditional sale contracts to finance companies (R. 97-100, 159-162) has gone through a complete cycle, and finally, on page 35 of appellee's brief, emerges as follows: "It is apparent that the directors * * * allowed him (Yee) to exercise unrestrained management of the corporation's financial affairs."

Appellee, having thus used the testimony of Treasurer Yokono of the very limited power of the president with respect to financial affairs of the corporation as authority

for assertions of a much greater authority on the president's part, then goes on to draw from these unsupported assertions of power its conclusion in the following language: "Clearly implied from these broad powers was the authority to endorse checks without countersignature of any other officer and to receive payment on behalf of the payee corporation." The difficulty with appellee's reasoning is the hypothesis that the president had broad powers.

Certainly, the evidence in the Record, viewed in its true light, and keeping in mind that all banking transactions were handled by Treasurer Yokono and General Manager and Vice-President Shintaku (R. 145, R. 29-30) will support no conclusion that Anthony Yee "had implied authority to endorse the checks in question and receive payment therefor on behalf of said corporation" (R. 24).

C. The argument of appellee in its brief in an effort to show that Anthony Yee had apparent authority to endorse the checks in question and receive payment in cash therefor, proceeds again upon the false premise as to his actual authority. Thus on pages 43-44 of appellee's brief we find the following passage:

"The action of the directors in conferring upon Anthony Yee the general authority to handle the financial arrangements for the corporation (R. 160, 161) was a manifestation to third parties that Yee had broad powers. In the exercise of these powers Yee assumed full control and management of the corporation's financial affairs."

As previously pointed out and at the risk of belaboring the matter, we repeat that the only evidence on the subject is that Mr. Yee handled the financial arrangements with the finance companies and that he did not have any other financial duties. His powers were not broad. Financial matters generally were handled by the Treasurer, Yokono (R. 97). All checks were signed in accordance with the by-laws by the Treasurer, Yokono and by the Vice-President and Gen-

eral Manager, Shintaku (R. 29-30). If the true state of the evidence is kept in mind, the argument of appellee on the point of apparent authority, and on all other points urged in its brief, falls.

Appellee continues on page 44 of its brief to argue as follows:

“During a period of four months, Anthony Yee cashed thirteen checks, each being made out to the corporate payee for a sum in excess of \$1,000. * * * Certainly, the directors, in the exercise of ordinary diligence, should have known what was happening to its revenue.”

There is nothing in the record to indicate that the checks were properly the revenue of the corporation, so as to charge the directors with a duty to ascertain why these checks were not being accounted for. We submit that the Court should make no assumption that these checks resulted from transactions whereby revenues normally would have been realized by Waipahu Auto Exchange, Ltd., but should require appellee to prove such fact, if fact it be, at a new trial.

Appellee argues that by cashing a check of Anthony Yee upon his endorsement, appellant represented to appellee that Anthony Yee was authorized to endorse and receive payment. An examination of the record (plaintiff's Exhibit B-1 through 12 [R. 53-64] defendant's Exhibit No. 2 [R. 70]) will reveal that at the time that appellant cashed the check referred to, appellee had already cashed nine of the twelve checks involved in this action. Further, apparent authority must emanate from action or failure to act on the part of the principal, not acts of third parties (see appellant's opening brief, pp. 37-38). That appellant made a mistake and paid Yee cannot inure to appellee's benefit, unless, somehow, the appellee bank knew of and relied on appellant's conduct — facts which do not appear in the record.

Appellee next urges that it relied upon the alleged apparent authority. As nearly as we can make out, the argu-

ment proceeds from the conclusion that the checks were cashed by appellee and that therefore they must have relied upon something. It is stated further that the practice of Mr. Yee cashing checks "apparently met with no objection from the directors of the corporation, for dealings with the finance companies were 'left entirely to Mr. Yee' " (appellee's brief, p. 45). In the absence of a showing that the directors were or should have been aware of the cashing of these checks by Anthony Yee, no significance can be attached to their failure to object. No such showing has been made. It is true that dealings with finance companies were left to Mr. Yee, but cashing of checks made payable to Wai-pahu Auto Exchange, Ltd., certainly is not a part of the making of arrangements with appellant as to the sale of conditional sale contracts.

Finally, appellee asserts that even if the bank had no knowledge of the "apparent authority" of Yee, nevertheless it is entitled to the benefit of those facts which it could have discovered upon reasonable inquiry. Three New York cases are cited but they are not authority for such a broad statement as that contained in appellee's brief (p. 45). Also, it is not clear from the decisions in these cases whether the courts were discussing actual, implied or apparent authority.

We refer the Court to our opening brief, pages 38-39, for statements of the generally recognized principal of law in regard to the necessity of reliance by the party asserting the existence of apparent authority. In addition to the authority cited therein, see: 2 *C.J.S. Agency*, sec. 96, pp. 1217, 1218, and *Perry v. New York Life Ins. Co.*, 22 N.Y.S. (2d), 696 (1940), a New York case more recently decided than those cited on p. 45 of appellee's brief. In the *Perry* case it is said at pp. 701-702:

"In California, as in New York and elsewhere, apparent or ostensible authority, or agency by estoppel, is created only by acts or neglects of the person sought to

be charged as principal, and the person dealing with the ostensible agent must have known of and relied on such acts or omissions, and such reliance must be in good faith and in the exercise of reasonable prudence."

In any event, reasonable inquiry, even a simple telephone call to the general manager or to the treasurer of the payee corporation, would have revealed the banking practices of the corporation.

Respectfully submitted,

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February, 1951

No. 12,679

IN THE

United States
Court of Appeals

For the Ninth Circuit

HOWARD BROWN, individually and as surviving partner of the copartnership of Sinton & Brown, and SINTON & BROWN, a copartnership composed of Howard Brown and Richard Roe Sinton and John Doe Sinton,

Appellants-Defendants,

VS.

COWDEN LIVESTOCK Co., a corporation,

Appellee-Plaintiff.

APPELLANTS' OPENING BRIEF

Upon Appeal from the District Court of the United States
for the District of Arizona

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No. 12,679

IN THE

United States Court of Appeals

For the Ninth Circuit

HOWARD BROWN, individually and as surviving partner of the copartnership of Sinton & Brown, and SINTON & BROWN, a copartnership composed of Howard Brown and Richard Roe Sinton and John Doe Sinton,

Appellants-Defendants,

vs.

COWDEN LIVESTOCK Co., a corporation,

Appellee-Plaintiff.

APPELLANTS' OPENING BRIEF

Upon Appeal from the District Court of the United States
for the District of Arizona

JURISDICTIONAL STATEMENT

This is an appeal by Howard Brown, individually and as surviving partner of the copartnership of Sinton & Brown, Dean Brown and Howard S. Brown, Florence R. Sinton

and Silas D. Sinton, Jr., as Executors of the Estate of Silas D. Sinton, deceased, as members of and constituting the partnership known as Sinton & Brown, as defendants, from a final judgment against them in the District Court of the United States for the District of Arizona, in favor of Cowden Livestock Co., a corporation, as plaintiff, entered on July 5, 1950.

Jurisdiction of the appeal exists under and by virtue of Sections 1291 and 2107, Judicial Code, Title 28, U. S. C. Jurisdiction existed in the District Court under and by virtue of Sections 1391 and 1441 et seq., Title 28 U.S.C.

Plaintiff instituted the action on February 28, 1948, by filing its complaint in the Superior Court of Arizona (R. 5). Within the time in which defendants were to answer such complaint, defendants caused the action to be removed to the District Court of the United States for the District of Arizona on the grounds that diversity of citizenship existed and that the matter in controversy exceeded \$3,-000.00 exclusive of interest and costs (R. 9-19). Defendants subsequently filed answer to the complaint in said Court (R. 19).

The action was tried before the District Court, and subsequently, on July 5, 1950, said Court entered its judgment in favor of plaintiff (R. 31-39). On August 3, 1950, and within the time prescribed by law, defendants filed their Notice of Appeal accompanied by a supersedeas bond (R. 39). The record on appeal was docketed and filed in this Court on September 11, 1950, within the time prescribed by law (R. 55).

STATEMENT OF THE CASE**PREFATORY NOTE**

For the convenience of the Court, there is attached, as a frontispiece hereto, a detachable addendum setting forth a chronological timetable of the events herein related.

In October, 1946, Cowden Livestock Co., hereinafter called plaintiff, one Roy Adams, of Tucson, Arizona, and one George Porter of Amarillo, Texas, entered into a three-party arrangement* pertaining to some 1961 head of steers then located near Nogales, Arizona, and then owned by the Slash Cattle Company, a partnership, of which Adams was a member (R. 58, 64, 65, 110, 111).

Between October 15, 1946, and November 15, 1946, all of the cattle were shipped by Adams from Nogales to Porter at Amarillo (R. 54). On November 15, 1946, plaintiff paid Slash Cattle Company \$184,660.40 for the cattle by means of a draft on the Valley National Bank executed on behalf of plaintiff by Adams (R. 60, 61).

All but 1213 of the 1961 head of cattle shipped to Amarillo were disposed of at Amarillo pursuant to the arrangement. Only the 1213 head are involved in this cause (R. 67, 68, 116-118, 136).

Early in February, 1947, Adams, by telephone, entered into an agreement with the partnership known as Sinton & Brown, hereinafter called defendants, under which he purported to sell to defendants an undivided one-half interest in the 1213 head for an amount that was to be calculated by multiplying 16¢ times one-half the gross weight of the cattle (R. 225-228). Under this arrangement:

*The undisputed facts as to the details of this arrangement are hereinafter set forth under Item I of the Argument (pp. 13, 14, 15, *infra*).

(a) at the outset, defendants were to advance, in addition to the sum above, an amount to be calculated by multiplying 15¢ times one-half the gross weight of the cattle (R. 227, 228);

(b) the cattle were to be shipped to the defendants' Santa Maria, California, feed lots where they were to be eventually sold by defendants (R. 227);

(c) defendants were to feed the cattle at the Santa Maria feed lots for an agreed upon daily feeding charge (R. 227);

(d) upon the eventual sale of the cattle, defendants were to keep one-half of the net profits, to be calculated by deducting the freight bill (from Amarillo to Santa Maria) and the defendants' advances and feed bill from the sale proceeds (R. 76, 227).

Neither at the time of the making of this agreement nor during any transactions thereafter had between defendants and Adams, did Adams represent to defendants that plaintiff had any interest in the cattle (R. 259).

Adams had been authorized by plaintiff to close a deal with defendants (R. 121). It was plaintiff's understanding that the agreement involved the features enumerated (b), (c) and (d) in the paragraph above, but that the agreement did not involve the sale of an undivided one-half interest in the cattle (R. 70, 71, 74-76, 119-121).

On February 14, 1947, defendants delivered to Adams its draft in the sum of \$16,000.00 payable to Adams as a deposit on the sums due under the agreement. Adams cashed this draft on February 18, 1947 (R. 230, 231).

Between April 1, 1947, and April 8, 1947, Porter shipped

the cattle from Amarillo to the defendants' feed lots at Santa Maria (R. 54).

On April 28, 1947, defendants in Santa Maria wrote a letter to Porter in Amarillo asking for the loading weights of the cattle (R. 235). Not having received a reply to their letter, defendants in Santa Maria, on May 9, 1947, sent plaintiff in Phoenix, Arizona, the following telegram (R. 77):

"May 9, 1947

"Ray Cowden
Cowden Livestock Co.
Phoenix, Arizona

I have been trying to get the Texas loading weights on the Adams cattle which we are feeding here. Roy tells me they are in your office and has authorized me to ask you for them. Would very much appreciate it if you could send them here 101 N. Broadway, Santa Maria, Calif. Thank you.

Howard Brown."

On May 10, 1947, in response to defendants' letter of April 28th, Porter in Amarillo sent to defendants in Santa Maria a telegram giving the loading weights of the cattle (R. 236). On May 16, 1947, defendants in Santa Maria mailed to Adams in Tucson their draft on the Livestock Loan Department of the Bank of America, Los Angeles, California, payable to Adams, in the sum of \$129,314.45, which said sum represented 15¢ times 968,763 pounds, the total weights as set forth in the Porter-defendants' telegram, less the \$16,000.00 deposit previously paid Adams. This draft was cashed by Adams on July 9, 1947, and paid by the Bank of America on July 12, 1947 (R. 239, 241).*

*It was on August 22, 1947 that defendants, in receiving their first statement of account from the Livestock Loan Department of

On May 15, 1947, plaintiff in Phoenix mailed to defendants in Santa Maria the following letter (R. 81, 82):

"Mr. Howard Brown
101 North Broadway
Santa Maria, California.

Dear Mr. Brown:

We are very sorry that it has taken so long to reply to your telegram. We did not have the weights of the Adams cattle here but had been trying for three weeks to obtain them from George Porter, and after a considerable exchange of telegrams, we have finally succeeded in obtaining them. Porter shipped a total of 1214 steers which weighed 973,700 pounds.

Ray talked with Roy Adams in Tucson yesterday and in view of the short time these steers will be in the feedlots we do not think it will be necessary to make the advance of 15¢ per pound at this time.

When any sales are made from this bunch of steers, please make the sales for the account of Cowden Livestock Co. and remit the proceeds to us at the above address.

Yours very truly,

COWDEN LIVESTOCK Co.

(signed)

C. A. Clements."

This was the only communication from plaintiff to defendants pertaining to the cattle prior to August 9, 1947 (R. 103, 124, 142).

On May 19, 1947, defendants in Santa Maria mailed to Adams in Tucson their check for \$4,843.81 which repre-

the Bank of America since May 12, 1947, learned for the first time that this draft was outstanding until July 12, 1947 (R. 246, 302, 306, 307).

sented 1½ times one-half of 968,763 pounds, the total weights as set forth in the Porter-defendants' telegram. Adams cashed this check on May 24, 1947 (R. 243, 245).

By the end of June, 1947, defendants had sold all of the cattle, receiving gross proceeds in the amount of \$240,-245.03 (R. 132, 133).

On July 5, 1947, at defendants' offices in Santa Maria, defendants delivered to Adams their check in the sum of \$19,454.27, representing one-half of the net profits from the sale of the cattle after deduction of feed charges, freight, and prior payments by defendants to Adams. This check was cashed by Adams on July 8, 1947 (R. 247-249). Upon the delivery of this check by defendants to Adams, the defendants also gave Adams certain statements of account, setting forth defendants' expenses, advances and computing the profits arising from the sales (R. 132, 133, 249-251). The aggregate total of the amounts transmitted by defendants to Adams equalled all of the monies which plaintiff, Adams and Porter were entitled to receive from the sale proceeds (R. 105, 106).

On Tuesday, July 8, 1947, plaintiff in Phoenix called Adams in Tucson by telephone (R. 84). Adams told plaintiff that all of the cattle had been sold (R. 84); that defendants had sent him a check for the cattle (R. 102); and that he had a statement of sales (R. 84). Plaintiff asked that Adams mail the papers to plaintiff, and a meeting was arranged between plaintiff and Adams in Phoenix for Wednesday, July 16, 1947 (R. 84, 85). Having received said papers from Adams, plaintiff, by July 16, 1947, had drawn up certain settlement sheets (R. 85, 86, 159).

On Wednesday, July 16, 1947, Adams met with the officers

of plaintiff, in Phoenix. Adams was presented with the settlement sheets and, upon his objection to the interest rate of five per cent applied to plaintiff's advances, the figures were recomputed and corrected on the basis of four per cent interest (R. 158). After the meeting one copy of the corrected settlement sheets was given to Adams (R. 211, 212), one copy was sent to Porter (R. 199, 200), and one copy was retained by plaintiff (R. 134, 135, 213). The final page of said settlement sheets reads as follows (R. 211):

"COWDEN LIVESTOCK CO. SETTLEMENT WITH ROY ADAMS ON TEXAS STEER DEAL			
Cowden Advances and Interest.....		\$244,441.98	
Cowden Share of Profit.....		6,409.03	
		<hr/>	\$250,851.01
Repayments:			
732 Steers Sold.....	\$ 92,943.63		
8 Steers Sold.....	1,112.89		
Adams Check.....	112,000.00	\$206,056.52	
	<hr/>	<hr/>	
Due from Adams.....		\$ 44,794.49."	

At this July 16, 1947 meeting Adams gave plaintiff his personal check in the sum of \$112,000.00 (R. 86, 103). This check was immediately cashed and the proceeds therefrom received by plaintiff (R. 86, 103, 142).

At this time, Adams also gave plaintiff his personal check in the sum of \$44,794.49 (R. 86, 103). Adams told plaintiff that he had the proceeds of the settlement with defendants available for payment to plaintiff but desired to use such proceeds temporarily (R. 35, 36), saying that he had used a portion of the money out of the steers to buy another bunch of cattle which he had shipped on Monday and Tuesday (July 14, 15) and that he would have the

return on that shipment on the following Monday (July 21) (R. 86, 143).^{*} Adams therefore requested that the check for \$44,794.49 not be deposited for payment until Saturday, July 19, 1947 (R. 86, 104, 143).

Plaintiff held this check until Saturday, July 19, 1947, and then deposited same for collection (R. 86, 104). On Wednesday, July 23, 1947, the check was returned unpaid for insufficient funds (R. 87). Thereafter plaintiff contacted Adams and at his suggestion redeposited the check for collection (R. 87, 104). When about a week later (July 31), the check was returned the second time, plaintiff again contacted Adams (R. 87). Early in August plaintiff determined that the check was uncollectible (R. 87, 105). If plaintiff had received the proceeds from this check it would have received all of the monies to which plaintiff in its own right was entitled from the sale of the cattle (R. 94, 95, 100-102, 149).

On August 9, 1947 plaintiff made written demand upon defendants for the sum of \$57,612.53[†] and on August 13, 1947 defendants refused said demand (R. 89, 90, 92, 93). Adams subsequently died (R. 101).

Plaintiff instituted suit alleging in two counts that defendants are indebted to plaintiff in the sum of \$57,612.53 on account of their alleged failure to remit proceeds from the cattle sales in that sum, and on account of their wrongfully withholding of said sum allegedly the property of

^{*}The two checks were accepted by plaintiff in the belief that Adams actually had currently received the funds due from the sale of the cattle and had such funds in his possession or available for payment of the checks (R. 339).

[†]For the basis for computation of this amount see the introductory note to Item II of the Argument (p. 21 *infra*).

plaintiff. Defendants answered both counts by pleading:

- (a) A general denial of indebtedness and of wrongful withholding of any sums belonging to plaintiff;
- (b) Receipt of payment by plaintiff;
- (c) Estoppel and waiver;
- (d) Ratification and waiver;
- (e) Defect in parties-plaintiff.

Trial before the Court was had on February 8, 9, 1949 and on July 5, 1950 the Court entered its Findings of Fact, Conclusions of Law and Judgment in favor of plaintiff in the sum of \$44,794.49, with interest thereon from August 9, 1947 until paid. Thereafter defendants perfected this appeal.

The questions involved in this appeal are:

(1) Did the lower court err in failing to dismiss plaintiff's complaint for the nonjoinder therein of George Porter and Roy Adams as indispensable parties-plaintiff?

(2) Did the lower court err in failing to enter judgment for defendants?

(3) Are the lower court's Findings of Fact clearly erroneous, or are its Conclusions of Law contrary to law?

SPECIFICATION OF ERRORS

I.

The District Court erred in failing to dismiss plaintiff's complaint for nonjoinder of George Porter and Roy Adams as indispensable parties-plaintiff because the documentary evidence and undisputed facts established that said parties were the plaintiff's copartners or joint venturers.

II.

The District Court erred in entering judgment for plaintiff because the documentary evidence and undisputed facts established that plaintiff has received payment of all monies which it seeks in its own behalf.

III.

The District Court erred in entering judgment for plaintiff because the documentary evidence and undisputed facts established that plaintiff is estopped to claim the monies for which recovery is sought in the complaint.

IV.

The District Court erred in entering judgment for plaintiff because the documentary evidence and undisputed facts establish that plaintiff ratified the act of its agent in collecting the monies for which recovery is sought in the complaint.

V.

The District Court erred in entering judgment for plaintiff for the reasons that the Findings of Fact upon which its Conclusions of Law and Judgment rest are clearly erroneous, and the Conclusions of Law as embodied in its Findings of Fact upon which its Judgment rest are contrary to law because the documentary evidence and undisputed facts establish that:

(A) The cattle in question and the proceeds therefrom were the property of the joint venture comprised of plaintiff, Porter and Adams. (All Findings of Fact and Conclusions of Law in Findings 3, 4, 5 and 16 contrary thereto are clearly erroneous and contrary to law.)

(B) Defendants paid Adams all monies from the sale proceeds to which plaintiff, Adams and Porter were entitled; on July 16, 1947, plaintiff did know that defendants had paid to Adams the amounts enumerated in Finding No. 11; plaintiff did approve of the manner in which the transaction had been handled; plaintiff did know all of the material circumstances surrounding the transactions between Adams and defendants; plaintiff accepted Adams' personal checks unconditionally; and defendants did suffer detriment by virtue of the action of plaintiff in accepting said checks. (All Findings of Fact and Conclusions of Law in Findings 10, 11, 12 and 14 contrary thereto are clearly erroneous and contrary to law.)

(C) Defendants, in paying Adams, did so with knowledge that Adams was plaintiff's agent; plaintiff in accepting the checks of Adams did ratify and intend to ratify Adams' act in collecting the sale proceeds from defendants; and plaintiff in making settlement with Adams did so with full knowledge of all the material facts and for the purpose of closing out the plaintiff-Porter-Adams arrangement. (All Findings of Fact and Conclusions of Law in Findings 17, 18 and 19 contrary thereto are clearly erroneous and contrary to law).

SUMMARY OF ARGUMENT

The undisputed facts of this case, stripped of all conclusions and inferences, have been set forth in the Statement of the Case. From these undisputed facts, this Court must determine whether the lower court erred, when, on

July 5, 1950, some seventeen months after the court trial of the case, it entered judgment for the plaintiff and adopted bodily as its own the Findings of Fact and Conclusions of Law advanced by plaintiff.

These undisputed facts upon which the lower court's judgment must be bottomed make it clear that:

I.

The plaintiff-Porter-Adams arrangement was that of a joint venture and the plaintiff's nonjoinder of Porter and Adams as indispensable parties-plaintiff is fatal to its recovery (Specifications I and V (A)).

II.

The plaintiff has received payment of the monies to which it is entitled (Specifications II and V (A), (B) and (C)), inasmuch as (A) defendants paid all monies due from them to Adams, who, as joint venturer or agent of plaintiff, was authorized to receive same, and (B) plaintiff accepted payment and other performance by Adams as full satisfaction of any claim against defendants.

III.

The defendants are innocent parties in this matter and since it was plaintiff's acts and acquiescence for more than three weeks in Adams' collection of the monies in question which caused the loss, plaintiff must bear that loss (Specifications III and V (B)).

IV.

The plaintiff in settling with Adams, accepting his checks, and acquiescing thereafter, for more than three weeks, in

Adams' collection of the monies, thereby ratified his collections (Specifications IV and V (C)).

ARGUMENT

I. The District Court Should Have Dismissed Plaintiff's Complaint for Nonjoinder of the Indispensable Parties-Plaintiff, the Plaintiff's Joint Venturers (Specifications I and V(A)).

A. PLAINTIFF, PORTER, AND ADAMS WERE ENGAGED IN A JOINT VENTURE.

The elements of a joint venture are (48 *C.J.S.* p. 809, sec. 2):

- (1) A community of interest and a common purpose.
- (2) A joint proprietary interest in the subject matter, contributed in some form by the respective parties.
- (3) Joint participation in the management of the enterprise.
- (4) The sharing of losses.
- (5) The sharing of profits.

The undisputed facts establish that each and all of these elements were attributes of the plaintiff-Porter-Adams arrangement:

(1) Community of interest—

The parties were to share equally in any profits or losses resulting from the cattle (R. 65, 108, 109, 203, 207) which were to be shipped at the outset to Porter for feeding (R. 65, 107, 108).

(2) Joint proprietary interest—

- (a) Plaintiff, having advanced the purchase monies for the cattle (R. 60), was to advance all further monies necessary for the shipping of the cattle to Amarillo and for

the feed bills at Amarillo (R. 67, 149). These monies with interest thereon were to be deducted from the eventual sale proceeds of the cattle before the parties' equal participation in the eventual profit or loss was to be determined (R. 85, 86, 157, 158, 211, 212).

- (b) Adams was to assist in securing feed or securing a buyer and arranging shipments; to inspect the cattle periodically and report on their feeding progress; to assist in the management of the deal to make it as profitable as possible; and to give plaintiff and Porter the benefit of his experience and judgment in handling the deal (R. 111-113, 207).
- (c) Porter was in sole charge of the Amarillo feeding end of the deal, where he was to place the cattle on pasture, deal with the people growing pasture there, and supervise the handling and care of the cattle (R. 112, 113, 203).

(3) Joint participation in management—

- (a) The cattle were shipped to Amarillo after discussion by the three parties (R. 107, 108).
- (b) The sale of the portion of the 1961 head not involved here and sold to Hulett was made after discussion by the three parties (R. 117).
- (c) The parties participated in the decision as to the movement of the cattle to Santa

Maria (R. 73, 74, 118, 120, 194, 195, 204); the decision as to the deal with defendants (R. 76, 121); and the decision as to the selling price to be asked for the cattle (R. 83, 84, 124, 125).

(4) Sharing in losses—

and

(5) Sharing in profits—

The parties were to bear any eventual losses or profits equally (R. 65, 108, 109, 203, 207).

It is of interest that both plaintiff (R. 116) and Porter (R. 195), when left to their own explanation as to who made the decisions and took certain actions, used the term “we.” Further, in describing his understanding of the deal with defendants, plaintiff’s president quite candidly referred to the “owners” of the cattle (R. 70). Indeed, this same president later volunteered that the whole arrangement was a “feed venture” (R. 140). Also significant is the fact that the arrangement is not distinguishable from the “Agreement of Joint Adventure” (R. 169-173), governing the operations of the Slash Cattle Company, which, in the words of plaintiff’s president, “was a partnership” (R. 58).

These undisputed facts pertaining to the plaintiff-Porter-Adams arrangement demonstrate conclusively that the arrangement was a joint venture, which under Arizona law has been described as a partnership formed for “a single transaction, although the business of conducting it may continue for a number of years.” (*Ruby v. United Sugar Co.*, 56 Ariz. 535, 109 P.2d 845, 850 (1941)).

It should be specifically noted that the sharing of losses, a feature foreign to a mere agency relationship and which has been held crucially determinative by the Arizona court (*Burney v. Smith*, 64 Ariz. 186, 167 P.2d 386, 389 (1946)), was a vital part of the plaintiff-Porter-Adams arrangement.

In strikingly analagous situations, the courts have held almost identical arrangements to be joint ventures:

Mid-Columbia Production Credit Ass'n v. Smeed, 171 Ore. 140, 136 P.2d 255 (1943) (A and B held to be joint venturers where engaged in buying and selling sheep; A would purchase sheep with own check and then draw on B for purchase price; eventual profits split 50-50 after deduction from sale proceeds of expenses and B's advances).

Moore v. Diehm, 200 Okl. 664, 199 P.2d 218 (1948); followed in *Moore v. Beier*, Okl., 210 P.2d 359 (1949) (A and B held to be joint venturers where engaged in buying and selling livestock; A would buy same by check on account financed by B; B would sell same at his pavilion; profits and losses split 50-50 after deduction from sale proceeds on *recapitulation sheets* of expenses and B's advances).

B. LESS THAN ALL JOINT VENTURERS CANNOT SUE ON OBLIGATION TO JOINT VENTURE.

Rule 19(a) of the *Federal Rules of Civil Procedure*, which is identical in language to Section 21-509, A.C.A. 1939, requires that "persons having a joint interest shall be made parties." Under this Rule, failure of a plaintiff to join an "indispensable" party-plaintiff denies the court the right to grant such a plaintiff any relief whatsoever and requires dismissal of a plaintiff's complaint.

6 *Cycl. Fed. Proc.*, pp. 200, 201, Section 2136;

2 *Moore's Federal Practice*, p. 2160.

A review of the authorities leads defendants to the conclusion that there are only two reported cases wherein this issue was involved in a joint venture situation. These two cases both hold that the several joint venturers are "indispensable" parties and, absent the joinder of all of them, the plaintiff's complaint must be dismissed.*

Bernitt v. Smith-Powers Logging Co., 184 F. 139 (C.C. Ore. 1911);

W. W. Oil Co., Inc. v. American Supply Co., La. App., 8 So.2d 384, 385 (1942).

In the case first cited above the court said at page 142:

"It is clear that the demurrer to the complaint must be sustained * * *. The case, therefore, is one where two out of three joint owners are suing a third party for a debt due the partnership or joint enterprise * * *. The law does not tolerate the splitting up of demands in bringing suit thereon. A defendant is entitled to have the entire claim prosecuted against him, or none, unless relinquished in part, and one or more members of a copartnership, less than the whole, cannot proceed to recover their undivided interest in a debt against any debtor of the firm. This is so elementary that it needs no authorities to sustain it * * *."

Since, however, a joint venture is merely a partnership for a single venture (*Ruby v. United Sugar Co.*, ante), and

*There is dicta to the contrary in *Sime v. Malouf*, Cal. App., 213 P.2d 788, 789 (1950). Since, however, the question of indispensability of parties must be determined by Federal rather than State rules (*Chicago, M. St. P. & P. R. Co. v. Adams County*, 72 F.2d 816, 818 (C.C.A. 9, 1934); *DeKorwin v. First Nat. Bank of Chicago*, 156 F.2d 858, 860 (C.C.A. 7, 1946)), the *Bernitt* decision and not the opinion of the California appellate court is controlling.

is governed by the law of partnership (48 C.J.S., p. 806, sec. 1), decisions on this issue where a partnership is involved serve to supplement the authorities cited above. Such decisions establish that copartners are indispensable parties-plaintiff in a suit upon an obligation to the partnership and failure to join all partners is fatal:

Seltzer v. Chadwick, 26 Wash. 2d 297, 173 P.2d 991, 993 (1946);

Midland Oil Co. v. Moore, 2 F.2d. 34, 36 (CCA 8 1924);

Moore v. Inhabitants of Town of Springfield, Me., 64 A.2d 569, 574 (1949);

Buch v. Newsome, 129 N.J.L. 585, 30 A.2d 579 (1943);

City of Orlando v. Murphy, 77 F.2d 702, 703 (CCA 5 1935).

In the case first cited above the Supreme Court of Washington unequivocally stated the rule to be:

“In order to maintain an action upon a partnership asset, the partners must be joined as parties to the action.” (*Seltzer v. Chadwick*, *supra*).

This Court has been the leader in defining what is an “indispensable” party within Rule 19(a):

Chicago M. St. P. & P. R. Co. v. Adams County, 72 F.2d 816, 818, 819 (CCA 9 1934);

State of Washington v. United States, 87 F.2d 421, 427, 428 (CCA 9 1936).

In this last cited case this Court laid down the following test for determining whether a person in an indispensable party:

“There are many adjudicated cases in which expressions are made with respect to the tests used to deter-

mine whether an absent party is a necessary party or an indispensable party. From these authorities it appears that the absent party must be interested in the controversy. After first determining that such party is interested in the controversy, the court must make a determination of the following questions applied to the particular case: (1) Is the interest of the absent party distinct and severable? (2) In the absence of such party, can the court render justice between the parties before it? (3) Will the decree made, in the absence of such party, have no injurious effect on the interest of such absent party? (4) Will the final determination, in the absence of such party, be consistent with equity and good conscience?

"If, after the court determines that an absent party is interested in the controversy, it finds that all of the four questions outlined above are answered in the affirmative with respect to the absent party's interest, then such absent party is a necessary party. However, if any one of the four questions is answered in the negative, then the absent party is indispensable." (*State of Washington v. United States, supra*).

Plaintiff, by the very amount for which it has prayed judgment, has established that plaintiff, Porter and Adams are interested in the controversy. Where, as here, a co-partnership or joint venture is involved, Nos. 1, 2 and 4 of this Court's determinative questions above must be answered in the negative. In the first place, absent one of the partners or joint venturers, less than all could have their interests in the partnership or joint venture determined *ex parte*. Secondly, such an *ex parte* determination could result in a subsequent double recovery from the third party

if the absent copartner or joint venturer were thereafter to sue and to establish that his interest in the partnership or joint venture was contrary to that established ex parte in the original suit.

The defendants therefore submit that the learned lower court erred in failing to dismiss plaintiff's complaint for nonjoinder by plaintiff of the indispensable parties-plaintiff, its joint ventures Porter and Adams, and in making the Findings designated above under Specification V (A). Defendants therefore respectfully urge this Honorable Court to correct the error of the court below and enter judgment for defendants.

II. The Plaintiff Has Received Payment of All Monies to Which It Is Entitled (Specifications II and V(A), (B) and (C)).

INTRODUCTORY NOTE

Following is a recapitulation of the various remittances made by defendants to Adams, and a brief statement of the plaintiff's basis for computing the amount of monies prayed for in its complaint:

RECAPITULATION OF DEFENDANTS-ADAMS REMITTANCES

Date	Amount	Calculation
Feb. 14, 1947 (R. 231)	\$ 16,000.00	Advance on monies to be paid under agreement.
May 16, 1947 (R. 239)	\$129,314.45	15¢ times 968,763 pounds the weights set forth in the Porter-defendants telegram minus the \$16,000.00 advance above. (Defendants were to advance 15¢ per pound on all the cattle (R. 227.))

Date	Amount	Calculation
May 19, 1947 (R. 243)	\$ 4,843.81	1¢ times $\frac{1}{2}$ of 968,763 pounds, the weights set forth in the Porter-defendants telegram (Defendants were to advance 16¢ per pound on one-half of the cattle (R. 227, 245)).
July 5, 1947 (R. 248)	\$ 19,454.27	$\frac{1}{2}$ of the net profits from the sale of the cattle after deducting from the sale proceeds defendants' advances to Adams, the freight bill and feed bill (R. 250, 251).
Total remittances.....	<u>\$169,612.53</u>	

All of these monies were received by Adams (R. 231, 239, 243, 248). Therefore, if Adams had authority to receive such monies as a joint venturer or agent of plaintiff, plaintiff has been paid any portion thereof to which it is entitled.

BASIS OF COMPUTATION OF THE AMOUNT PLAINTIFF SEEKS TO RECOVER

\$169,612.53—Total remittances by defendants to Adams	\$44,794.49—The amount of monies to which plaintiff is entitled out of the plaintiff-Porter-Adams arrangement, and the amount of the Adams-plaintiff check which eventually proved worthless.
\$112,000.00—Amount of one of Adams-plaintiff's checks	\$ 6,409.02—Adams' share of the profits from the arrangement.
	\$ 6,409.02—Porter's share of the profits from the arrangement.
<u>\$ 57,612.53</u>	<u>\$57,612.53</u> —Total amount for which recovery is sought.

The sum of \$44,794.49 (the amount of the lower court's judgment) is admitted by plaintiff to be the total amount to which plaintiff is entitled in its own right from the arrangement (R. 94, 95, 100-102). On July 16, 1947, plaintiff accepted Adams' personal check in this sum, and consented to hold same before attempting collection until July 21, 1947 (R. 86, 103, 104, 143).^{*} At the time of accepting this check plaintiff also accepted another of Adams' personal checks in the sum of \$112,000.00. Plaintiff immediately deposited this check for collection and received it proceeds. This last sum, in addition to \$44,794.49, totaled the amount to which plaintiff was then entitled out of the sale proceeds. Therefore, if plaintiff accepted these two checks as payment and other performance by Adams in full satisfaction of any claim against defendants, defendants are discharged from all obligation to plaintiff.

A. ADAMS, AS JOINT VENTURER OR AGENT OF PLAINTIFF, WAS AUTHORIZED TO RECEIVE THE MONIES PAID BY DEFENDANTS.

Since the plaintiff-Porter-Adams arrangement was a joint venture, which is governed by the law of partnership (see Argument I, *ante*), Adams, in the absence of an agreement with his joint venturers to the contrary, had implied authority to receive payment of the monies owing to the joint venture. (40 *Am. Jur.*, sec. 158, p. 241; 47 *C.J.*, sec. 332, p. 860). As stated in the last cited treatise, the elementary rule is that:

"Every partner has implied authority to receive payment of firm debts, in the absence of an agreement to

^{*}While the understanding was to not deposit the check until July 19, 1947 (Saturday), it is clear that the parties realized that collection was not to be effectuated until July 21, 1947 (Monday).

the contrary; . . . This implied authority to receive payment of firm debts results from each partner's general agency for the firm," . . .

The plaintiff, having totally failed to prove an agreement between the joint venturers to the contrary, has failed to rebut this presumption of implied authority which arises from the joint venture relationship. The plaintiff, therefore, by virtue of the defendants' payments to Adams, plaintiff's joint venturer, must be deemed to have been paid all monies for which recovery is sought.

The record, even if it were reviewed without recognition of this presumption of implied authority, can only support the conclusion that Adams, as agent of plaintiff, had authority to accept the monies collected by him. This is true despite the fact that there is no direct testimony in the record establishing that plaintiff ever *expressly* granted such authority. Authority can be *implied*, as well as express, and when it is the former, it must necessarily be proved by circumstantial evidence.

The *Restatement of the Law of Agency* in Section 26 (pp. 72-75), which is followed by the Arizona courts in the absence of Arizona law to the contrary (*Ingalls v. Neidlinger*, Ariz., 216 P.2d 387, 390 (1950)), states the rule as follows:

"Section 26. Creation of Authority;

General Rule.

". . . authority to do an act may be created by . . . conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account.

“*Comment:*

“* * * * *

“. . . the manifestation and not the intention of the principal is important ; hence whenever the principal manifests to the agent that the agent is to act on his account, authority exists although the principal does not, in fact, consent.

“* * * * *

“*Comment:*

“. . . The manifestations to the agent may be made by the principal directly, or by any means intended to cause the agent to believe that he is authorized or which the principal should realize will cause such belief.

“* * * * *

“*Comment:*

“. . . The authority to perform a particular act . . . may be created by directing an agent to perform acts which involve the performance of the act in question; or it may be inferred from words or conduct which the principal has reason to know indicate to the agent that he is to do the act for the benefit of the principal.

...

“*Illustrations:*

“4. P. delivers a chattel to A and authorizes him to sell it for cash. Nothing is said about delivery to the purchaser or the receipt of payment by A. Having sold the chattel, A has authority to deliver the chattel to the buyer and to receive the purchase price.”

Applying this principle, the *Restatement of the Law of Agency* sets down the further rules:

“Section 71. When Authority is Inferred.

“Unless otherwise agreed, authority to receive payment is inferred from authority to conduct a trans-

action if the receipt of payment is incidental to such a transaction, usually accompanies it, or is a reasonably necessary means for accomplishing it."

"Section 34. Circumstances Considered in Interpreting Authority.

"* * * * *

"b. If an agent has been previously employed, ordinarily he may assume that he is authorized to continue to do what he has been doing to the knowledge of the principal without objection from him. . . ."

"Section 44. Interpretation of Ambiguous Instructions.

"If an authorization is ambiguous because of facts of which the agent has no notice, he has authority to act in accordance with what he reasonably believes to be the intent of the principal although this is contrary to the principal's intent; . . ."

The case of *Little v. Brown*, 40 Ariz. 206, 11 P.2d 610, 613 (1932), recognizes the general principle that authority can be implied as well as express. The court said:

"... but agency does not have to be proved by direct testimony. It is susceptible of proof as is any other fact and may be established from the circumstances, such as the relation of the parties to each other and to the subject-matter, their acts and conduct. . . ." (11 P.2d 613).

In *Arizona Storage & Distributing Co. v. Rynning*, 37 Ariz. 232, 293 P. 16, 17 (1930), the court found from the circumstances of the case implied authority in an agent to collect monies saying:

"... The agency to do a thing may be actual or it may arise from implication. . . ."

Before relating the undisputed facts which, under the above citations, require the conclusion that Adams had implied authority to receive the monies in question, defendants would have the Court note that although there is no direct testimony establishing that he had express authority so to act, *neither is there a whit of testimony directly denying that he had such authority or establishing that he was forbidden or had agreed not so to act.*

Viewed chronologically, the testimony and documentary evidence of this case establish without contradiction the following facts:

(1) Plaintiff, Porter and Adams had entered into similar arrangements pertaining to other cattle (R. 114-116). Whether in these instances Adams collected the proceeds from the sale thereof is uncertain, since in answer to such question, plaintiff's president stated:

"I'd have to check my records to see" (R. 116).

Since the plaintiff's president was uncertain as to Adams' authority to collect in other similar deals, the inference would appear inescapable that he is uncertain as to the extent of Adams' ambiguous authorization in the deal at hand.

(2) When plaintiff purchased the original 1961 head of cattle (only 1213 of which are here involved) and after the making of the plaintiff-Porter-Adams arrangement, plaintiff paid the vendor therefor by means of a draft in the sum of \$184,660.40. This draft was executed by:

"Cowden Livestock Co. By Roy Adams." (R. 60)

The Valley National Bank, upon which this draft was drawn, recognized Adams' authority to execute a draft in such amount for plaintiff and paid same (R. 60).

Since Adams, in November, had authority from plaintiff to pay some \$184,000.00 of plaintiff's money to a third party to purchase certain cattle, and since there is no evidence of any subsequent restrictions on his authority, the inference would appear inescapable that Adams in the ensuing February, May and July, had authority from plaintiff to collect from a third person some \$168,000.00 due to the plaintiff, Porter and himself from the proceeds of sale of a part of the same cattle.

(3) Adams, according to plaintiff's president (R. 113), was authorized to show and sell the cattle, subject to the confirmation of plaintiff. The authority of defendants to sell the cattle for the amounts received is not questioned (R. 121, 156, 157, 132-134), and this authority, prior to receipt of plaintiff's letter of May 15, 1947, necessarily was delegated by Adams, since, prior to that date, plaintiff had never communicated with defendants (R. 124, 142). Since the first time plaintiff discussed with Adams the asking price to be placed on the cattle was after May 15, 1947 (R. 150), and within the first fifteen days of June (R. 83), by which time defendants had disposed of at least 159 head (R. 132), to which plaintiff did not and does not object, it becomes clear that Adams must have had some actual authority to authorize the sale of the cattle. Further evidence of this conclusion is found in the fact that though plaintiff's president set $21\frac{1}{2}\text{¢}$ a pound as the selling price for the cattle (R. 83, 124, 125), it did not and does not object to the fact that, after June 15, 1947, defendants sold 59 head for 20¢ a pound; 1 head for $17\frac{1}{2}\text{¢}$ a pound, and 105 head for $19\frac{1}{2}\text{¢}$ a pound (R. 132, 133).

Since Adams' authority was flexible enough to include this delegation of power of sale, the inference would appear inescapable that the same authority was flexible enough to include that which is incidental to and usually accompanies such authority, the power to receive the sale proceeds, a part of which were to belong to him.

The record is barren of either direct evidence contradicting these conclusions, or evidence from which contradictory conclusions can be inferred. The letter of May 15, 1947, from plaintiff to defendants, does not purport to limit the extent of Adams' authority, and, further, not having been communicated to Adams, cannot be construed as a restriction on his authority for it is fundamental that:

"* * * notice of the revocation (of authority) must be given the agent; a revocation without notice to him will not render invalid acts done in pursuance of the authority. * * *" (2 *Am. Jur.*, sec. 42, p. 41).

It is also a well settled rule that a principal's failure to object to, and his acquiescence in, an act of an agent after learning thereof, establish that the agent had implied authority to do the act in question. The *Restatement of the Law of Agency* recognizes this principle in Section 43 (pp. 102-104):

"Section 43. Acquiescence by Principal in Agent's Conduct.

"(1) Acquiescence by the principal in conduct of an agent whose previously conferred authorization reasonably might include it, indicates that the conduct was authorized; * * *

"* * * * *

"*Comment:*

"a. Persons ordinarily express dissent to acts done on their behalf which they have not authorized or of

which they do not approve. If the agent has been previously authorized and the extent of his authority is uncertain, the performance of acts by the agent which might reasonably be within the authorization and acquiescence therein by the principal, indicates that the parties understood that such acts were authorized, * * *

“* * * * *

“*Comment:*

“c. In the absence of other evidence as to the agent’s authority, the fact that the principal acquiesces in the conduct of the agent is sufficient evidence to prove authorization * * *”

Late cases applying this last principle to facts not unlike those herein involved are:

Platt v. Union Packing Co., 32 Cal. App. 2d 329, 89 P.2d 662, 666 (1939);

Heck v. Heck, 63 Cal. App. 2d 470, 147 P.2d 110, 112 (1944);

Chase v. Sullivan, 99 Fla. 202, 126 So. 359 (1930).

In the *Platt* case a principal’s acquiescence for a period of thirty days in an agent’s purchase of cattle was held to constitute sufficient evidence of the principal’s prior implied authorization thereof.

The undisputed facts of this case compel application of this last stated principle. Here, by July 9, 1947, Adams had collected from defendants all monies to which he, plaintiff and Porter were entitled out of the sale proceeds (R. 106). By July 16, 1947, plaintiff had learned at least the following facts:

(1) “that Sinton & Brown had sent him (Adams) a check for the cattle” (R. 102);

(2) "that Mr. Adams had directly collected his part of the proceeds" (R. 96);

(3) "that he (Adams) got that \$112,000 from Sinton & Brown" (R. 145, 147).

As the lower court found (at the request of plaintiff), on July 16, 1947 Adams advised plaintiff:

"* * * that he had used the money received from Sinton & Brown to receive some cattle and that, therefore, he then had the proceeds of the settlement with Sinton & Brown available for payment to plaintiff but desired to use such proceeds temporarily." (R. 35, 36)

For twenty-four days after July 16, 1947, the date of receipt of the \$44,794.49 check, plaintiff acquiesced in the acts of Adams in making the collections. At the outset it held the check from Wednesday to Saturday before depositing it for collection, knowing that even then the check was not expected to be honored until the subsequent Monday. Thereafter it redeposited the check for collection at least one more time and contacted Adams with reference thereto at least twice more. It was not until August 9, 1947 that plaintiff ceased to look to Adams, and, reversing its field, sought to hold defendants for the monies which Adams had dissipated (R. 86-88, 103-105).

Since Adams' previously conferred authorization reasonably might have included Adams' conduct in making the collections in question, the fact that plaintiff, with knowledge of all material facts, acquiesced in such conduct for over three weeks, compels the conclusion that the conduct was authorized (*Restatement*, Section 43, *ante*). Not only is there an absence of evidence to the contrary, but, as above noted, the other evidence in the record supports this conclusion.

The learned court below, therefore, clearly erred in failing to find that plaintiff has received payment of all monies to which it is entitled and in making the Findings designated above under Specifications V (A), (B) and (C). Defendants therefore respectfully urge this Honorable Court to correct the error of the court below and enter judgment for defendants.

B. PLAINTIFF ACCEPTED PAYMENT AND OTHER PERFORMANCE BY ADAMS AS FULL SATISFACTION OF ANY CLAIM AGAINST DEFENDANTS.

The *Restatement of the Law of Contracts*, which is the law of Arizona, absent prior decisions to the contrary (*Ingalls v. Neidlinger, ante*), states the following in Section 421 (p. 793):

“Section 421. Discharge of Duty by a Third Person’s Performance.

“A payment or other performance by a third person, accepted by a creditor as full or partial satisfaction of his claim, discharges the debtor’s duty in accordance with the terms on which the third person offered it.

* * *

“* * * * *

“*Illustration:*

“1. A owes B a liquidated undisputed debt of \$100. C pays B \$50 in satisfaction of A’s debt, and A (sic) accepts the payment as satisfaction. The payment, being made by a third person discharges the debt.”

In *Neavitt v. Upp*, 57 Ariz. 445, 114 P.2d 900, 902 (1941), the Arizona court cited and applied this section of the *Restatement* in holding that a mortgagor was discharged from all obligation to the mortgagee when the mortgagee accepted from a third party a cash sum and bonds in full settlement of the mortgagor’s obligation.

In the case at bar the undisputed facts are that Adams (C in the illustration of the *Restatement* quoted above) not only paid B (plaintiff) the \$50 (\$112,000.00), but also gave "other performance" (delivery of the \$44,794.49 check together with a promise to have sufficient cash in the bank six days later to cover that check—not at all unlike the bonds in *Neavitt v. Upp, supra*). If, then, the undisputed facts disclose that B (plaintiff) accepted this payment and other performance as full satisfaction of A's (defendants') obligation, A's (defendants') obligation was discharged. What is the evidence?

At the time of accepting these checks, plaintiff delivered to Adams certain settlement sheets, on the top of one of which the plaintiff had typed:

"COWDEN LIVESTOCK CO.

SETTLEMENT WITH ROY ADAMS ON TEXAS
STEER DEAL" (R. 211)

These settlement sheets were of the kind "necessary to make a settlement on a feeding arrangement of this kind" and were drawn up "to settle up the entire transaction" (R. 84, 85). The July 16, 1947 plaintiff-Adams meeting was arranged by plaintiff's president "to make settlement on the deal" (R. 148) and on that date Adams did come "to settle up" (R. 148, 154).

Plaintiff states that it accepted the two checks in the belief that:

" * * * Adams actually had currently received the funds due from the sale of the cattle and had such funds in his possession or available for payment of the checks * * *" (R. 339).

It is also undisputed that for twenty-four days after receiving Adams' check, plaintiff made no collection overture to defendants, continuing in the interim to attempt collection of Adams' \$44,794.49 check, which it deposited for collection at least twice, waiting for at least two weeks for the bank to make collection thereof. This was the same check which, upon receipt, they consented to hold and did hold for three days before attempting collection (R. 86-88, 103-105).

From these facts the conclusion that plaintiff received Adams' check in satisfaction of any obligation of defendants appears inescapable. Indeed, the plaintiff-Adams agreement pertaining to the checks given to plaintiff by Adams at the July 16, 1947 meeting would appear to bring the entire settlement transaction within the rule that a check or note is payment when the party receiving same has agreed thereto (40 *Am. Jur.* pp. 766, 767, 769, sections 76, 79). The high court of New York State found such to be the case in an analogous case. *Stewart v. Union Mut. Life Ins. Co.*, 155 N.Y.S. 257, 49 N.E. 876, 877, 878 (Ct. App. 1898). There an insured sent his insurer a note to cover the amount of his premium. Subsequent thereto the insurer wrote the insured:

"* * * 'Your note for \$123.10 given in settlement of premium due on pol. No. 93,094 will be due and payable on the 31st inst. at your office, where it will be presented at that date' * * *"

The court held on these facts that the note constituted payment, saying:

"* * * was the note accepted by the company in payment for the first year's premium? The cashier, in

effect,' states that it was. He says: 'Your note for \$123.10, given in settlement of premium due on pol. No. 93,094, will be due and payable,' etc. It was given in settlement of the premium. Bouvier defines 'settlement' to mean 'payment in full,' so that it would seem that the company not only accepted the note in payment for the first year's premium, * * *"

It would thus appear that the effect of the Adams-plaintiff July 16, 1947 transaction was to extinguish not only the defendants' obligation, but also any obligation of Adams except for that created by the delivery of the check.

The learned court below therefore clearly erred in failing to find that plaintiff has received payment of all monies to which it is entitled and in making the Findings designated above under Specification V (B) and (C). Defendants therefore respectfully urge this Honorable Court to correct the error of the court below and enter judgment for defendants.

III. The Defendants Are Innocent Parties in This Matter, and Since It Was Plaintiff's Acts and Acquiescence for More Than Three Weeks in Adams' Collections of the Monies in Question Which Caused the Loss, Plaintiff Must Bear That Loss (Specifications III and V(B)).

One branch of the doctrine of estoppel in Arizona is as stated in *Hallenbeck v. Regional Agricultural Credit Corp.*, 47 Ariz. 477, 56 P.2d 1041, 1043 (1936):

"This conclusion is based upon the well-recognized principle of equity that of two innocent persons the one whose act causes a loss should bear it. *Green v. Gila Water Company*, 36 Ariz. 303, 285 P. 263; *California Bank v. Daniel*, 36 Ariz. 549, 288 P. 7; *Hughes v. Riggs Bank*, 29 Ariz. 44, 239 P. 297; *Brandon v. Carr*, 28 Ariz. 454, 237 P. 642."

While the court below has found that plaintiff's letter of May 15, 1947 to defendants constituted notice of plaintiff's interest in the cattle, the undisputed facts established that defendants had no *actual* notice of plaintiff's interest in the cattle until receipt of plaintiff's letter of August 9, 1947 (R. 260). The vagueness of the wording of the May 15th letter and the utter unlikelihood that defendants would consciously ignore any notice that was in fact designed to protect them, makes it difficult to see how defendants were guilty of any negligence in the matter. The negligence would appear attributable to the draftsman of the misleading letter. Assuming, however, that it may have been defendants' original negligence which set in motion the forces that eventually resulted in a loss to be shouldered by either the plaintiff or the defendants, that negligence was committed in complete good faith.

The undisputed facts also establish that on July 16, 1947 plaintiff had an opportunity to prevent the loss which eventuated. On that date plaintiff knew that all of the material facts pertaining to Adams' collections of monies from defendants and further knew that Adams then had available certain cattle which he had purchased with a portion of the proceeds that he had collected (*ante*, p. 30). At this point plaintiff had, in effect, a "last clear chance" to prevent a loss to either plaintiff or defendants. Had it demanded the monies from Adams or given defendants an opportunity to do so via legal attachment of the cattle which he had purchased, the entire loss could have been prevented. Instead, the plaintiff negligently listened for twenty-four days to Adams' promises to make good his check and only thereafter, as an afterthought, turned to the defendants.

Under these circumstances, the doctrine of the *Hallenbeck* case is applicable and plaintiff should receive nothing from the defendants.

The learned court below therefore clearly erred in failing to find that plaintiff is estopped to claim the monies for which it is suing and in making the Findings designated above under Specification V (B). Defendants therefore respectfully urge this Honorable Court to correct the error of the court below and enter judgment for defendants.

IV. The Plaintiff in Settling with Adams, Accepting His Checks, and Acquiescing Thereafter for More Than Three Weeks in Adams' Collection of the Monies, Thereby Ratified His Collections (Specifications IV and V(C)).

A. THE UNDISPUTED FACTS.

Previously set forth (*ante*, p. 30) is the pertinent evidence bearing on what plaintiff knew on July 16, 1947 when it accepted Adams' checks in "settlement" of the arrangement, and what plaintiff did thereafter until its letter of August 9, 1947 to defendants. Without repeating that evidence here or any of the undisputed facts set forth in the Statement of the Case, defendants submit that the record can support only the following conclusions: (1) plaintiff, on July 16, 1947 knew all of the material facts pertaining to Adams' collections; (2) plaintiff approved and affirmed these acts of Adams; (3) Adams in making the collections was intending to act for and on behalf of the plaintiff-Porter-Adams arrangement; (4) while Adams in making the collections did not purport to defendants to be acting for and on behalf of plaintiff, defendants knew at the time that they paid over the monies to Adams that he was acting for and on behalf of plaintiff. The arguments that follow

assume that all findings of fact contrary thereto are clearly erroneous. Defendants also assume (contrary to fact—see Argument II A. *ante*), for the purposes of these arguments, that Adams, at the time of making the collections, was completely lacking in authority from plaintiff to do so.

B. THE LAW OF RATIFICATION.

1. The Minority Rule.

Treatises quite generally, in their formal statement of the requisite elements of ratification, state that in order for a principal to ratify an unauthorized act of an agent, the agent must have purported to the third person at the time he was doing the act to be acting for and on behalf of his principal. See, e.g., 2 *Am. Jur.*, p. 177, section 222. A majority of the courts of this country have accepted this statement in one form or another without giving the matter any real analysis. See, e.g., *Pullen v. Dale*, 109 F.2d 538, 539 (C.C.A. 9, 1940). A minority of the jurisdictions of this country, however, have refused to follow the doctrine, stating that in order for a principal to ratify the act of his unauthorized agent it is sufficient if the agent at the time of doing the act *intended* to act for his principal.

Hayward v. Langmaid, 181 Mass. 426, 63 N.E. 912 (1902);

Clews v. Jamieson, 182 U.S. 461, 45 L.Ed. 1183, 1184 (1901);

Speer v. Campbell, 167 Wash. 700, 9 P.2d 1100, 1103 (1932).

The majority doctrine found its origin in 1901 in the House of Lords' decision, *Keighley v. Durant* (1901), Appeal Cases 240, which reversed a decision of the Queen's

Bench Division, *Durant v. Roberts* (1900), 1 Q.B. 629, adopting the minority rule. In that case the agent had been authorized by defendant to buy wheat at a certain price. The agent bought of plaintiff at a higher price, contracting in his own name, but intending it to be on the joint account of himself and defendant. This intention was not disclosed to plaintiff. Subsequently defendant acquiesced in the contract and agreed to take the wheat jointly with the agent but failed to do so. Plaintiff sold at a loss and sued defendant for damages. The trial court directed the verdict for defendant. The Queen's Bench Division, in opinions written by Collins, L. J. and Romer, L. J. from which A. L. Smith, L. J. dissented, stated that "the point has never been actually decided" and, in deciding the case "in accordance with * * * principle and common sense," held that the minority rule stated above was the proper one. On appeal, the House of Lords reversed, *Keighley v. Durant, supra*.

In what Mechem terms an "able article,"* these English decisions and all other authorities are given meticulous scrutiny by Professor E. C. Goddard in 2 *Michigan Law Review*, 25 (1903). Prefacing his remarks with the following statement:

"* * * Here then we have two of the three judges of the Queen's Bench Division and all the judges of the supreme court of Massachusetts, including Holmes, C. J., reaching one conclusion, while all the judges of the supreme court of Michigan† and all the law judges sitting in the House of Lords come to the opposite conclusion. * * *" (2 *Mich. L. Rev.* 25, 26 (1903)),

*1 *Mechem on Agency* (2d Ed.), p. 283, Section 387, note 2.

†*Ferris v. Snow, et al.*, 130 Mich. 254, 90 N.W. 850 (1902).

Goddard concludes that "no good reason, except a technical one growing out of definition rather than business conditions" has ever been advanced against the adoption of the minority rule (2 *Mich. L. Rev.* 25, 45 (1903)).

Apparently the only other commentators who have analyzed this issue are the authors of the two notes which appear in 22 *Michigan Law Review* 474 (1923) and 22 *Columbia Law Review* 465, 467 (1922). Both of these articles reach the conclusion that the minority rule is the correct one.

The *Columbia Law Review* article carefully considers both views:

"The instant case, as treated by the court, falls within the fifth classification, being a case where A intends to act for P but purports to act for himself. In England it is now definitely settled that in such a case P cannot ratify. The Supreme Court of the United States and the courts of Massachusetts allow P to ratify, and in New York and Alabama there are dicta to the same effect. But the weight of American authority is that he cannot ratify. This, however, is by no means so well settled as a perusal of texts and encyclopedias would lead one to believe. Many of the cases cited for this proposition are merely dicta, though strongly expressed, being cases where A did not intend to act for P, or cases of sealed instruments.

"One reason given by the courts for refusing to allow ratification in such a case is the fear that a contrary rule would enable A to make a contract in his own name, and either perform it himself, or, if it suited his purpose, declare that he had made it as agent, thus permitting ratification by anyone whom he chose. This reasoning is based on the fact that one can very easily lie about his intentions. Many rules of law, however, make requisite the determination of intention, as in

criminal law. And even in the law of agency itself, the majority of the courts will not allow ratification by P unless A has purported and *intended* to act for P. Furthermore, if the courts are desirous of preventing the shifting of contracts by a falsification of intention, they have not gone far enough. For where A purports to act for an unnamed principal, he can either reveal himself or another as the intended principal.

"Another objection to allowing ratification in this type of case is that it would enable P to become a party to a contract which originally was between T and A, and under which he originally had neither rights nor duties. So to allow seems at first blush inconsistent with the law of contracts. But the doctrines of undisclosed principal, and of ratification, both of which are anomalies in the law of contracts, are well-established parts of the law of agency. The question is not, whether the allowance of ratification would be inconsistent with the theory of contracts; but whether the application of both these doctrines to the same case involves any further and undesirable inroad into the theory. It is submitted that this question is properly answered in the negative.

"As regards P it can make no difference to him what the agent purported, since he knows all the facts, and presumably ratifies because he thinks it to his advantage to do so.

"From the point of view of T, it may be objected that he is made a party to a contract with one to whom he had not intended to become obligated. But that is no different from the ordinary case of the authorized agent for an undisclosed principal. Also, it may be objected that, though T is originally not bound to P, he becomes bound to him without receiving any further consideration. But this, likewise, is no different from the ordinary case of ratification where the third party

becomes bound by the act of the disclosed principal alone.

"Assuming that the doctrines of ratification and of undisclosed principal, despite their anomalous character, are justified in practice, why should they not both be applied simultaneously to the same case if the facts call for such application? Assuming it to be a practicable and desirable rule that P should be represented and bound by A, though A has not revealed P's interest, and assuming it to be a practicable and desirable rule that P should be able by his unilateral acts to assume the rights and duties of a contract which A has made for him, does either rule become the less practicable or the less desirable because of the presence of the other? It hardly seems so.

"The instant case allowed ratification; but it did so only on the express facts of the case. Indeed, it approved in a dictum the doctrine that an undisclosed principal cannot ratify. The unsoundness of this rule is illustrated by the fact that the court refused to follow it to its obvious conclusion. It is unfortunate that the court did not strike at the root of the problem and disapprove the doctrine rather than circumvent it." (22 Col. L. Rev. 465, 467, 468, 469 (1922).)

The *Restatement of the Law of Agency* has in Section 85 adopted the majority rule. It is significant however, that Professor Warren A. Seavey, probably the foremost contributor to the formulation of that work, indicates that *this adoption was due to the authors' belief that it represented "the prevailing view."* Professor Seavey admits that it is "a much disputed point" and that "it is by no means certain that this is the most desirable result." 12 *Neb. L. B.* 247, 251 (1934).

There is no Arizona decision in point, although there are dicta* in two decisions, from which inferences in favor of either the majority or minority rule can be drawn. As stated above, the Arizona courts follow the *Restatement* where there is no Arizona law to the contrary (*Ingalls v. Neidlinger, ante*). There is, however, one limitation upon this doctrine which has not been previously stated because of the inapplicability of the limitation to the situation then at hand. That limitation has been well stated in the case of *Reed v. Real Detective Pub. Co.*, 63 Ariz. 294, 162 P.2d 133, 137, 138 (1945):

“This court has adopted the rule that where not bound by its previous decisions or by legislative enactment, it would follow the *Restatement of the Law*.
* * * We think it would be unwise to follow this rule blindly, * * *”

In that case the Arizona court gave careful analysis to the *Restatement's* rules pertaining to an action for the invasion of the right of privacy, and, only after concluding that the *Restatement's* view was sound, accepted same. Defendants submit that this court in determining Arizona law is in exactly the same position as the Arizona court. It can-

**Gillespie Land & Irrigation Co. v. Hamilton*, 43 Ariz. 102, 29 P.2d 158, 162 (1934): “* * * It is the law that a contract made even by a stranger, to say nothing of an agent without full authority, may be ratified by the principal, * * *”; *Young Mines Co. v. Citizens' State Bank*, 37 Ariz. 521, 296 P. 247, 250 (1931): “* * * A ‘ratification’ is the subsequent approval by a principal of a previous unauthorized act by one claiming to act as an agent, and in such case it is immaterial whether there had been an alteration in the position of the parties. To illustrate: B, who is A’s agent, pays \$5,000 to C without any actual or apparent authority to do so. A, subsequent to the payment, approves it. If A sues to recover the money from C, the latter may plead ratification, but cannot claim an estoppel on these facts alone.”

not follow the *Restatement* "blindly," but must carefully analyze the *Restatement's* view and then either follow it if in this Court's opinion the Arizona court would find that view sound, or reject it if in this Court's opinion the Arizona court would find that view unsound. Defendants ask no more than for this Court to recognize, as has the Arizona court, that an illogical result is too high a price to pay for uniformity.

Defendants submit that the majority rule is patently unsound: "for in every case of an undisclosed principal the contract is ostensibly, and so far as the intention of the other party is concerned, made with the agent, and it clearly is not necessary that the agent should expressly state that he is acting for a principal. There is really no greater difficulty in principle in the introduction of a party into a contract by means of subsequent ratification by him in a case where the person making the contract did not affect to act for a principal than in a case where he did. There being by the hypothesis no antecedent authority to make the contract in either case, in neither could the maxim '*Qui facit per alium facit per se*' apply at the time when the contract was made.'" ((1900) 1 Q. B. 631, 632, 633).*

Since the facts will only support the conclusions that Adams was in fact intending to act for and on behalf of plaintiff at the time he collected the monies in question from defendants, and because all the other elements of ratification are present, plaintiff must be deemed to have ratified Adams' acts.

*The words of Scrutton, then the "learned junior counsel" (1 Q. B. 631, 634) in *Durant v. Roberts*.

2. The Majority Rule.

Even if, however, this Court should hold that the majority rule is the law of Arizona, plaintiff must be deemed to have ratified Adams' acts within the meaning of that rule. This is because, even under the majority rule:

“* * * It is not essential that the assumed agent shall have declared himself such in express terms * * *” (1 *Mechem on Agency* (2d Ed.) p. 282, Sec. 386.)

Quoting from the House of Lords decision, *Keighley v. Durant*, *supra*, Mechem recognizes that the only requirement of the majority rule is that—

“* * * an agent he must be known to be, and as agent he must act * * *” (*Keighley v. Durant* (1901), Appeal Cases 240, 259).

The lower court has found that defendants had notice of Adams' agency by virtue of the letter of May 15, 1947. Since this letter must be deemed notice of all facts which it would disclose to a reasonable man, it is clear that Adams was known by defendants to be an agent at the time he collected the monies in question. All of the other elements of ratification being present, plaintiff, even under the majority rule, must therefore be deemed to have ratified Adams' collections.

The learned court below therefore clearly erred in failing to find that plaintiff ratified the acts of Adams in collecting the monies in question and in making the Findings hereinabove designated in Specification V (C). Defendants therefore respectfully urge this Honorable Court to correct the error of the court below and enter judgment for defendants.

CONCLUSION

Defendants conclude and summarize their entire argument as follows:

The arrangement between plaintiff, Porter and Adams pertaining to the cattle was clearly that of a joint venture. Not only did these parties have a common purpose in the deal, but also they all made definite contributions to the arrangement and they all took a major part in all decisions pertaining thereto. Furthermore, each was to share equally in any resulting profits or losses. While the sharing of profits may be common to a mere agency relationship, the sharing of losses is most certainly utterly foreign thereto. Being joint venturers with plaintiff, their nonjoinder as indispensable parties-plaintiff was fatal, and plaintiff's complaint should have been dismissed.

Further it is clear that under the Arizona doctrine of estoppel, plaintiff is estopped to demand the monies it is claiming. While it may be that plaintiff's misleading letter gave defendants notice of the plaintiff's claim to the cattle, it is also true that prior to Adams' complete dissipation of the monies plaintiff knew that he had collected same and knew that he had used the portion for which he gave the bad check to purchase other cattle which he then had on hand. Instead of notifying defendants thereof, so that they might have an opportunity to protect themselves by means of attachment or otherwise, plaintiff thereafter, for more than three weeks, sat idly by, listening to Adams' promises while he was becoming insolvent. Under these facts, the Arizona courts will not permit plaintiff to claim any monies from defendants.

Again, the record is clear that plaintiff ratified Adams' acts in collecting the monies, by accepting his checks and thereafter delaying more than three weeks before seeking to be made whole by defendants. It is clear that plaintiff, when it accepted Adams' checks, knew all of the material facts pertaining to his collections, and that its three weeks' acquiescence therein constituted affirmance. Since the record will not support any other conclusion except that Adams, at the time he was accepting the monies, was intending to act on behalf of plaintiff, it follows that under the minority rule discussed above, which defendants submit would be followed by the Arizona courts, plaintiff must be deemed to have ratified his acts. And because of the notice of plaintiff's interest and Adams' agency, which the lower court found defendants to have, plaintiff must be deemed to have ratified his acts even under the majority rule discussed above.

The same undisputed facts as to plaintiff's acquiescence, after knowledge of Adams' acts and prior to its afterthought collection overtures to defendants, when considered with the undisputed facts pertaining to the plaintiff-Adams meeting of July 16, 1947, establish that on that date plaintiff accepted payment (\$112,000.00) and other performance (delivery of a check which in effect was a promissory note payable in four days) from Adams as full satisfaction of defendants' obligation, and, indeed, except for the check, of any obligation of Adams.

As must be apparent to this Court, the most striking thing about the undisputed facts and documentary evidence which comprise the record of this case is the overwhelming circumstantial proof that Adams had *implied* authority to make the collections. Since the plaintiff-

Porter-Adams arrangement was a joint venture and because there is no evidence of an agreement among the joint venturers to the contrary, the conclusion as to Adams' implied authority flows from the joint venture relationship itself.

And even if this relationship were ignored, the conclusion is inescapable. While there was no direct testimony that Adams was given express authority to make the collections, neither was there any direct testimony that he had been forbidden or had agreed not so to do. The letter of May 15, 1947, not having been communicated to Adams, does not, of course, contradict the circumstantial evidence. Here was an agent who in November had authority to pay out on behalf of the plaintiff some \$184,000.00, with no showing of any restrictions on his authority being imposed thereafter; an agent who may well have had the authority in other similar deals to make collections; an agent who had at least some powers of sale, flexible though they may have been; an agent who participated in all major decisions pertaining to the cattle; an agent who was to bear equally with plaintiff any losses from the deal; an agent who was entitled to at least a portion of the monies which he collected; and an agent in whose acts of collecting some \$168,000.00 in July were acquiesced in by plaintiff for some twenty-four days before objecting thereto. If the above circumstances, all of which are uncontrovertedly established through the plaintiff's own evidence, when pieced together, do not establish that Adams had implied authority to make the collections in question, then in truth it may be said that this Honorable Court has held that in Arizona there is no such thing as implied authority, that in Arizona an agent is authorized to do only those things

which a principal expressly states he can do. Defendants respectfully submit that such is not the law of Arizona, nor indeed of any other jurisdiction.

Defendants confidently assert that this Honorable Court, after reviewing the entire evidence, will be left with the definite and firm conviction that a mistake has been committed (*United States v. U. S. Gypsum Co.*, 333 U.S. 364, 395, 92 L. Ed. 746, 766 (1947)).

Wherefore, defendants respectfully urge this Honorable Court to enter judgment in its favor.

Respectfully submitted,

EVANS, HULL, KITCHEL & JENCKES,
NORMAN S. HULL,
JOHN E. MADDEN,

Attorneys for Appellants-Defendants.

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ADDENDUM

Timetable of Events

- October, 1946 —Plaintiff, Adams, Porter enter into tripartite arrangement pertaining to cattle.
- October 15, 1946
- November 15, 1946—Cattle shipped to Porter at Amarillo, Texas.
- November 15, 1946—Plaintiff, by Adams, pays \$184,660.40 for cattle and takes bill of sale.
- February, 1947 —Adams makes agreement with defendants.
- February 14, 1947—Defendants pay Adams \$16,000.00 as advance on agreement.
- April 1, 1947
- April 8, 1947 —Cattle shipped to defendants at Santa Maria, California.
- April 28, 1947 —Defendants (Cal.) write Porter (Tex.) for weights.
- May 9, 1947 —Defendants (Cal.) wire plaintiff (Ariz.) for weights.
- May 10, 1947 —Porter (Tex.) wires defendant (Cal.) giving weights.
- May 15, 1947 —Plaintiff (Ariz.) writes defendants (Cal.) giving weights and asking defendants to remit proceeds to plaintiff.
- May 16, 1947 —Defendants (Cal.) mail Adams (Ariz.) draft for \$129,314.45.
- May 19, 1947 —Defendants (Cal.) mail Adams (Ariz.) draft for \$4,843.81.
- May 24, 1947 —Adams cashes \$4,843.81 check.
- End of June —Defendants have sold all cattle receiving proceeds of \$240,245.03.
- July 5, 1947 —Defendants give Adams at Santa Maria their check for \$19,454.27 and give him statements of account.
- July 8, 1947 —Plaintiff-Adams telephone conversation arranges July 16 meeting.
- July 8, 1947 —Adams cashes \$19,454.27 check.
- July 9, 1947 —Adams cashes \$129,314.45 draft.
- July 12, 1947 —\$129,314.45 draft paid by defendants' bank.
- July 16, 1947 —Plaintiff-Adams meeting at Phoenix, Arizona, at which Adams gives plaintiff personal checks in the sums of \$112,000.00 and \$44,794.49 and plaintiff gives Adams settlement sheets.
- July 16, 1947 —Plaintiff cashes Adams' \$112,000.00 check.
- July 19, 1947 —Plaintiff deposits Adams' \$44,794.49 check for collection.
- July 23, 1947 —Adams' \$44,794.49 check returned to plaintiff unpaid, plaintiff contacts Adams.
- July 24, 1947 —Plaintiff redeposits Adams' \$44,794.49 check for collection.
- July 31, 1947 —Bank again returns check unpaid.
- August , 1947 —Plaintiff again contacts Adams re the check.
- August , 1947 —Plaintiff determines Adams' check uncollectible.
- August 9, 1947 —Plaintiff demands monies of defendants.
- August 13, 1947 —Defendants refuse plaintiff's demands.
- August 22, 1947 —Defendants learn for first time that \$129,314.45 draft was outstanding until July 12, 1947.

No. 12,679

IN THE
United States
Court of Appeals
For the Ninth Circuit

COWDEN LIVESTOCK CO., a corporation,
Appellant-Plaintiff,

VS.

HOWARD BROWN, individually and as surviving partner of the copartnership of Sinton & Brown, Dean Brown and Howard S. Brown, Florence R. Sinton and Silas D. Sinton, Jr., as Executors of the Estate of Silas D. Sinton, deceased, as members of and constituting the partnership known as Sinton & Brown,

Appellees-Defendants

APPELLANT'S OPENING BRIEF

Upon Appeal from the District Court of the United States
for the District of Arizona

SNELL & WILMER

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Phoenix, Arizona

Attorneys for Appellant-Plaintiff

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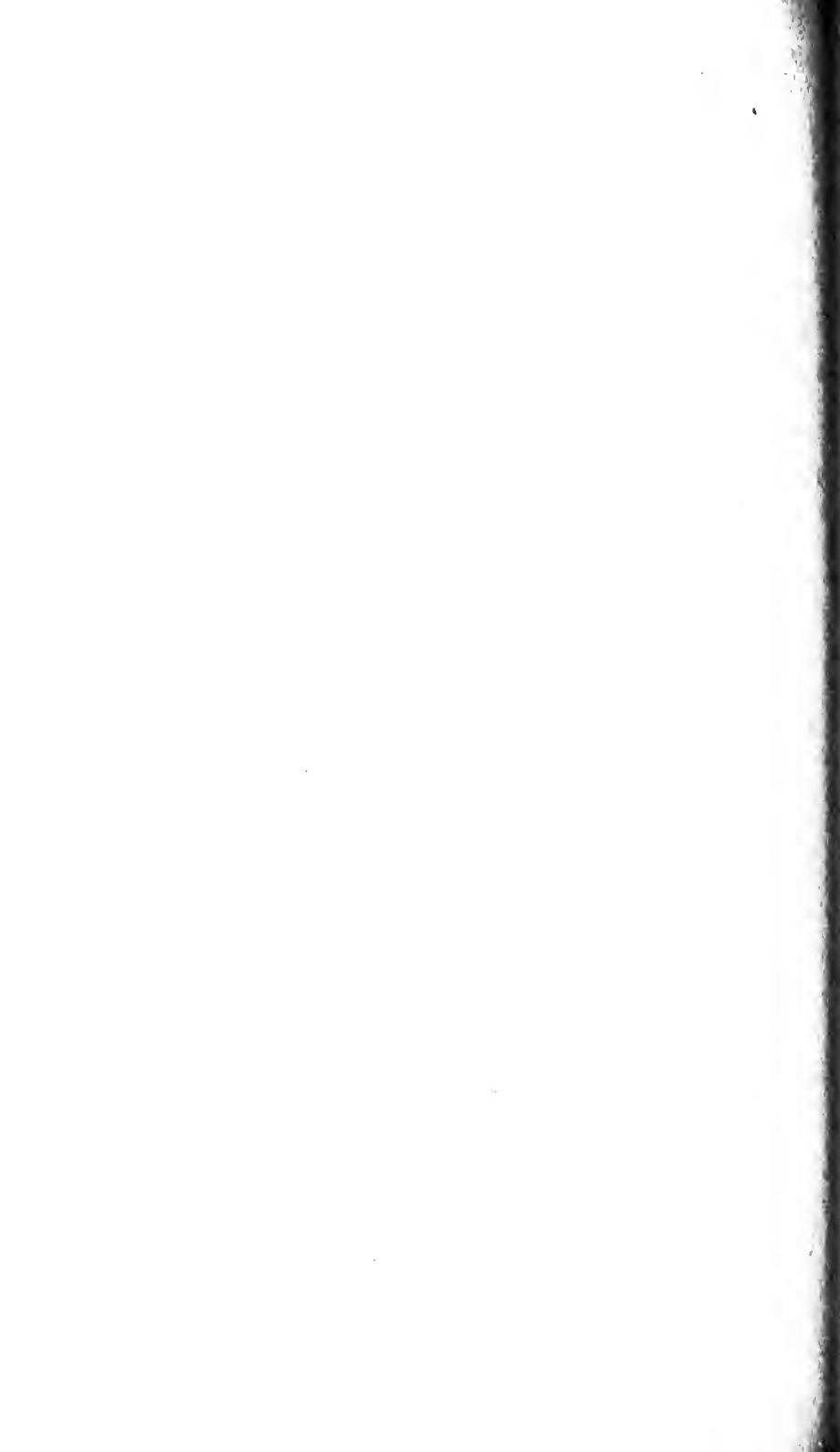
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No. 12,679

IN THE
United States
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COWDEN LIVESTOCK CO., a corporation,
Appellant-Plaintiff,

VS.

HOWARD BROWN, individually and as surviving partner of the copartnership of Sinton & Brown, Dean Brown and Howard S. Brown, Florence R. Sinton and Silas D. Sinton, Jr., as Executors of the Estate of Silas D. Sinton, deceased, as members of and constituting the partnership known as Sinton & Brown,

Appellees-Defendants

APPELLANT'S OPENING BRIEF

**Upon Appeal from the District Court of the United States
for the District of Arizona**

JURISDICTIONAL STATEMENT

This is an appeal by Cowden Livestock Co., a corporation, from the final judgment entered on July 5, 1950, in the District Court of the United States for the District of Arizona in an action instituted by appellant, as plaintiff, against Howard Brown, individually and as surviving partner of the copartnership of Sinton

& Brown, and Sinton & Brown, a copartnership composed of Howard Brown and Richard Roe Sinton and John Doe Sinton, as defendants. The judgment rendered in the court below is in favor of appellant for the sum of \$44,794.49 and appellant has appealed therefrom only in so far as the judgment fails to allow and adjudge to appellant the full amount sued for viz: \$57,612.53 and in so far as the judgment fails to allow and adjudge to appellant the sum of \$6,409.03, representing the portion of the money sued for by appellant which would, upon collection, be payable by appellant to one George Porter (R. 41).

The District Court had jurisdiction under Sections 1391 and 1441 et seq., Title 28, U. S. C. This Honorable Court has jurisdiction under Sections 1291 and 2107, Title 28, U. S. C.

The complaint in the action was filed on February 28, 1948, in the Superior Court of the State of Arizona in and for the County of Maricopa, alleging in two counts that defendants were indebted to plaintiff in the sum of \$57,612.53 on account of their failure to remit proceeds of sales of plaintiff's cattle, and on account of their wrongful withholding of the sum of \$57,612.53 belonging to the plaintiff (R. 2-5). By timely proceedings, defendants caused the removal of the action to the District Court of the United States for the District of Arizona because diversity of citizenship existed and the matter in controversy exceeded \$3,000.00, exclusive of interest and costs (R. 9-17). Thereafter, defendants filed answer to the complaint in the District Court, pleading (a) a general denial, (b) payment by defendant, (c) estoppel, (d) ratification and waiver, and (e) defect of parties plaintiff (R. 19-25).

After trial before the District Court, judgment was entered on July 5, 1950 (R. 31-39). Plaintiff filed its Notice of Appeal and its Bond on Appeal on August 3, 1950, within the time permitted by law (R. 41-45). The record on appeal was filed and docketed in this Court on September 11, 1950, within the time fixed by order of the District Court (R. 55, 332).

STATEMENT OF THE CASE

With the permission of the court, the parties will be referred to here by name or as they appeared in the court below, i.e. appellant as plaintiff and the appellees as defendants.

In the month of February, 1947, plaintiff was the owner of 1214 head of cattle then being fed by plaintiff in the vicinity of Amarillo, Texas, the cattle being in the custody and control of one George Porter (R. 64, 181, 182, 192, 193).

Plaintiff had acquired the cattle by purchase in Arizona in the month of October, 1946, and, at about the time of the purchase, had entered into an oral understanding with Porter and one Roy Adams, pursuant to which the cattle were to be shipped to Porter at Amarillo and to be there fed until ready for market (R. 59, 60, 61, 65). By the terms of the oral agreement, Porter and Adams were to contribute their services, skill and knowledge in the feeding and handling of cattle, plaintiff was to pay all shipping and feeding expenses, and each of the three parties was to receive one-third of the profits made by reason of the feeding operation (R. 65, 67, 108, 111-113, 149). Plaintiff, as owner of the cattle, had the sole right to direct the movement of the same, and the time and manner of their sale or other disposition; and all proceeds from the sale of the cattle were the property of plaintiff (R. 67, 68, 73, 74, 193).

Early in February, 1947, Adams, by telephonic communication with defendants, purported to sell to defendants a one-half interest in plaintiff's cattle (R. 226, 227). Under the agreement between Adams and defendants, defendants were also to advance certain sums to Adams on the remaining one-half of the cattle, finance the feeding and finishing of the entire lot at defendants' yards at Santa Maria, California, and divide with Adams the profits from the sale of the entire lot, after deducting all expenses of feeding and finishing the cattle (R. 227, 228). Im-

mediately following the making of the arrangement by telephone, defendants mailed to Adams, on account of the agreement, their draft in the sum of \$16,000.00 (R. 230-233).

In dealing with defendants and making the agreement with defendants, Adams represented that he was the owner of plaintiff's cattle (R. 225). However, plaintiff knew nothing of Adams dealings with defendants and, in fact, at about the time of such dealings, was contemplating moving the cattle to Kansas or to Arizona when the Texas pasture was exhausted (R. 68, 119).

About the middle of March, 1947, Adams represented to plaintiff that he had negotiated an arrangement with defendants under the terms of which plaintiff's cattle could be shipped from Amarillo to defendants at Santa Maria and there fed out for market (R. 69, 72). In this regard, Adams represented to plaintiff that defendants would: (1) advance to plaintiff .15c per pound on the cattle on their arrival at Santa Maria; (2) make a further advance of .01c per pound at the time settlement was completed; (3) pay the freight on the cattle from Amarillo to Santa Maria; and (4) feed the cattle until ready for market at a charge of .50c per head per day for the first 30 days of feeding, .55c per head per day for the second 30 days of feeding, and .60c per head per day for the time required thereafter to ready the cattle for market (R. 74, 75). Adams further represented to plaintiff that, under the arrangement with defendants, upon the sale of the cattle there would be deducted the advances made by defendants, including the freight and expenses of moving the cattle from Amarillo to Santa Maria, and the costs of feeding the cattle, and the profit remaining would be divided between plaintiff and defendants (R. 75, 76). Relying on the representations of Adams as to the arrangement with defendants, plaintiff caused the cattle to be shipped from Amarillo to defendants at Santa Maria in early April, 1947 (R. 76).

Following the delivery of the cattle to defendants, and on May 15, 1947, plaintiff wrote defendants advising that no advances

need be made by defendants on the cattle and expressly directing defendants to make all sales of the cattle for the account of plaintiff and to remit the proceeds to plaintiff (R. 81, 82). Practically contemporaneously with defendants' receipt of this letter from plaintiff, defendants mailed their draft in the sum of \$129,314.45 to Roy Adams at Tucson, Arizona (R. 239, 241). Adams did not present this draft for payment or cash the same until July 9, 1947 (R. 239). On May 19, 1947, defendants mailed to Adams at Tucson their check in the sum of \$4,843.81 and this check was cashed by Adams on May 24, 1947 (R. 243, 245). On July 5, 1947, defendants delivered to Adams at Santa Maria their additional check in the amount of \$19,454.27, which was cashed by Adams on July 8, 1947 (R. 247-249).

In the latter part of May and in early June, 1947, plaintiff on several occasions discussed with Adams the sale of the cattle and finally, through Adams, authorized the sale of the same by defendants (R. 83, 150). On July 8, 1947, plaintiff reached Adams by telephone and was informed that all of the cattle had been sold and that Adams was in possession of settlement figures furnished by defendants. In that telephone conversation, Adams agreed to immediately mail the settlement figures to plaintiff and to meet with plaintiff at Phoenix on July 16, 1947 (R. 84, 85).

The settlement figures mailed by Adams to plaintiff prior to the meeting arranged for July 16, 1947, showed total income from sales of plaintiff's cattle made by defendants in the amount of \$240,245.03 (R. 132). According to the arrangement under which plaintiff authorized the delivery of the cattle to defendants, there was deductible from this total income the sum of \$47,412.90 for defendants feeding of the cattle, \$8,609.14 for freight paid by defendants in transporting the cattle from Amarillo to Santa Maria, and \$14,610.45 as defendants' share for the increase in the weight of the cattle, or a total of deductions of \$70,632.49 (R. 132-135). Accordingly, the amount due plaintiff was the sum of \$169,612.54, out of which the plaintiff would owe

Adams the sum of \$6,409.02 and Porter the sum of \$6,409.03 for their respective shares of the profits derived from the feeding and handling of the cattle (R. 135).

In either his telephone conversation with Adams on July 8, 1947, or his conference with Adams in Phoenix on July 16, 1947, plaintiff learned for the first time that some payment had been made by defendants to Adams of the proceeds of the sale of plaintiff's cattle (R. 85, 154). Plaintiff, because he understood that the sale of his cattle had been accomplished very recently, assumed that whatever payment had been made by defendants to Adams was also made very recently (R. 97, 141). Plaintiff did not know on July 16, 1947, nor did he learn until some time after August 13, 1947, of the payments made by defendants to Adams on February 14, 1947, May 16, 1947, May 19, 1947, and July 5, 1947 (R. 97, 98, 147, 153).

In the meeting of July 16, 1947, at Phoenix, Adams advised plaintiff that Porter was indebted to Adams, and that he desired to retain the amount which would be payable to Porter for his share of the profits in order to make settlement directly with Porter (R. 95). Accordingly, he proposed to withhold both his share and Porter's share of the profits, or a total of \$12,818.05, and to pay over to plaintiff the difference between that sum and \$169,612.54, viz: \$156,794.49 (R. 95, 96). To accomplish this payment to plaintiff, Adams delivered to plaintiff two checks, one in the amount of \$112,000.00 and the other in the amount of \$44,794.49 (R. 86). With regard to the \$44,794.49 check, Adams explained to plaintiff that he had used a portion of the sales proceeds received by him from defendants to purchase a lot of cattle, which cattle he had sold and from which he would have the proceeds by July 21, 1947 (R. 86, 98). Adams asked, therefore, that the \$44,794.49 check be not deposited by plaintiff for payment until July 19, 1947 (R. 86, 98).

Plaintiff did not approve of the manner in which his cattle and the sales proceeds thereof had been handled by Adams and

defendants, and so expressed himself to Adams (R. 86). However, in the belief and with the understanding that defendants had made payment to Adams very recently before July 16, 1947, and that Adams then had the funds from such payment or readily cashable assets representing such funds, plaintiff accepted the two checks (R. 97, 98, 143).

The \$112,000.00 check delivered by Adams to plaintiff was promptly cashed by plaintiff (R. 86). The \$44,794.49 check was held by plaintiff until July 19, 1947, and then deposited for collection (R. 104). On July 23, 1947, the check was returned to plaintiff unpaid (R. 87). After contacting Adams, plaintiff redeposited the check, and when it was returned the second time unpaid, plaintiff again contacted Adams but was unsuccessful in obtaining payment of the check (R. 87).

The representation made to plaintiff by Adams in their meeting on July 16, 1947, to the effect that Porter was indebted to Adams was false and untrue, and Porter has not been paid anything on account of his share of the profits of the feeding operation (R. 194, 196). Under the terms of a written agreement with Adams, Baca Float Ranch, Inc., a corporation, was the owner of one-half of Adams' share of the profits of the feeding operation, and it also held a written assignment from Adams which covered the other half of such profits (R. 165, 169-174). Notice of the claims of Baca Float Ranch, Inc. to Adams share of the profits was served on plaintiff prior to the institution of this action (R. 176).

On August 9, 1947, plaintiff made demand upon defendants for the amount sued for herein and, payment having been refused, plaintiff filed this suit. The cause was tried in the court below, without a jury, on February 8th and 9th, 1950, and submitted on briefs. Findings of Fact, Conclusions of Law, and Judgment in favor of plaintiff in the sum of \$44,794.49, with interest thereon from August 9, 1947, until paid, were entered in the court below on July 5, 1950.

This appeal raises a single question: Did the court below err in failing to enter judgment for plaintiff for the full amount sued for in its complaint, \$57,612.53?

SPECIFICATION OF ERROR

1. The District Court erred in failing to render and enter judgment in favor of plaintiff and against defendants for the full amount prayed for in the complaint, viz: \$57,612.53, because such judgment was warranted and required by the evidence in the case and the law applicable thereto.

SUMMARY OF ARGUMENT

1. Payment by defendants to Adams of the proceeds from the sale of plaintiff's cattle was not payment to plaintiff, except to the extent that such proceeds were actually received by plaintiff from Adams.

2. Plaintiff never received \$57,612.53 of the proceeds from the sale of his cattle; and he is, therefore, entitled to judgment against defendants in that amount.

3. The fact that Adams would have been entitled, upon plaintiff's collection of the proceeds from the cattle, to receive from plaintiff the sum of \$6,409.02 as his share of the profits from the feeding operation, did not render the payment of that sum by defendants to Adams a payment pro tanto by defendants to plaintiff.

ARGUMENT

The evidence adduced upon the trial of this cause showed, and the trial court found:

(a) That plaintiff had the sole right to direct the movement of the cattle involved herein, their disposition, and the time and manner of the sale thereof, and all proceeds from the sale of the cattle were the property of plaintiff, subject to an accounting to Roy Adams and George Porter as to

the profit derived from the feeding operation; that the title to the cattle at all times remained in plaintiff (R. 33, 67, 68, 73, 74, 193).

(b) That subsequent to the delivery of the cattle to defendants at Santa Maria, plaintiff directed defendants in writing to sell the cattle for the account of plaintiff and to remit the proceeds to plaintiff (R. 34, 81, 82).

(c) That in accepting Adams checks in the amounts of \$112,000.00 and \$44,794.49, plaintiff did not know all of the circumstances surrounding the transactions between Adams and defendants and assumed that defendants had settled with Adams after the sale of the cattle; that plaintiff did not know that Adams had represented himself as the owner of the cattle and did not know that Adams had purported to sell the cattle in February, 1947; and that plaintiff accepted Adams checks conditionally upon their being honored and paid when presented for payment (R. 36, 86, 97, 98, 143, 147, 153).

(d) That plaintiff, in accepting Adams checks, did not ratify or intend to ratify Adams unauthorized representations that the cattle belonged to him, or Adams representations that he was entitled to sell the same and collect the proceeds thereof, either for his own account or for the account of the plaintiff (R. 37, 97, 98, 147, 153).

The foregoing evidence and findings clearly establish that there was no authority, real or apparent, in Adams to receive payment for plaintiff, and that plaintiff did not ratify Adams action in collecting the proceeds of the cattle or any representations which Adams may have made to defendants as to his authority to collect such proceeds. It follows, therefore, that defendants made payment to Adams at their own risk, and any sums paid to him which were not received by plaintiff did not constitute a payment to

plaintiff by defendants of their obligation to remit to plaintiff the proceeds of the cattle sales.

40 Am. Jur., Sec. 24, p. 728

And since the full amount due to plaintiff and never received by him is the sum of \$57,612.53, the judgment for plaintiff below should have been in that amount and not in the amount of \$44,794.49.

It may be contended that, inasmuch as Adams was the recipient of the monies paid by defendants, and plaintiff would have been obligated upon receipt of the monies to pay \$6,409.02 to Adams as his share of the profits on the feeding operation, the payment by defendants to Adams satisfied plaintiff's obligation to Adams and should, to the extent of \$6,409.02, therefore, be held to constitute payment by defendants to plaintiff. But the mere fact that an owner of property, after he collects the proceeds from a sale thereof, may be obligated to pay to third parties having no ownership or interest in the property, certain sums of money computed and determined in relation to the amount received by the owner, in payment for services rendered in connection with the property by such third parties, does not justify or permit payment of the sales proceeds, or any part thereof, to such third parties; and payment of the sales proceeds, or any part thereof, to such third parties is not a defense in an action by the owner of the property to recover the sales proceeds.

Linville v. Jones, 137 S. W. 415 (Tex. Civ. App. 1911);

Harrison v. Moran, 163 Mass. 495, 40 N. E. 850 (1895);

Martin v. Sharp & Fellows Contracting Co., 34 Cal. App. 584, 168 P. 373, 375 (1917);

Caskie v. Philadelphia Rapid Transit Co., 334 Pa. 33, 5 A. 2d 368, 372 (1939).

Moreover, in the case at bar the fact is that Baca Float Ranch, Inc. was entitled to receive all of the profits earned by Adams in the feeding operation, and prior to the institution of this action it asserted to plaintiff its claim to such profits (R. 165-177).

Certainly, no reduction of defendants' obligation to plaintiff can be justified merely because under the feeding operation among plaintiff, Porter and Adams, Porter was entitled upon the sale of the cattle and the receipt by plaintiff of the sales proceeds, to his share of the profits in the sum of 6,409.03. It is true that at the meeting between plaintiff and Adams at Phoenix on July 16, 1947, plaintiff agreed to permit Adams to settle directly with Porter; but it is equally true that this agreement was obtained solely by Adams false statement to plaintiff that Porter was indebted to him (R. 95, 96, 194, 196). Porter has not been paid, by Adams or anyone else, and he is looking to plaintiff to collect the proceeds of the sale of the cattle and to account to him for his share of the profits (R. 196). Plaintiff has both the obligation and the right to collect the proceeds and account to Porter.

We submit that the judgment below should be modified to provide for the recovery by plaintiff from defendants of the sum of \$57,612.53, with interest thereon at the rate of 6% per annum from August 9, 1947, until paid; and that, as so modified, said judgment should be by this Honorable Court affirmed.

Respectfully submitted,

SNELL & WILMER

MARK WILMER

JAMES A. WALSH.

Attorneys for Appellant-Plaintiff

APPENDIX

(Included here because of its omission from
the record as originally printed.)

[Title of Court of Appeals and Cause.]

**CONCISE STATEMENT OF POINTS RELIED UPON BY
APPELLANT, COWDEN LIVESTOCK COMPANY**

Pursuant to the requirements of Rule 19(6) of the Rules of Practice of this Court, appellant, Cowden Livestock Company, herewith files with the Clerk of this Court the following concise statement of the points upon which it will rely as appellant herein:

This action is one wherein appellant as plaintiff in the trial court sought recovery for certain cattle alleged to have been the property of appellant, which livestock had been sold by appellees, defendants below, without making proper accounting and remittance to appellant. There was no dispute in the evidence offered in the trial court to the effect that the cattle were the property of appellant, Cowden Livestock Company, and there was likewise no dispute that Cowden Livestock Company had the sole right to authorize the sale of said cattle and the sole right to collect and receive proceeds of such sales. It appeared that one George Porter and Roy Adams were entitled to receive payment for their services in connection with the handling and feeding of these cattle, based upon the percentage of profit made in the handling and sale of said cattle, which said compensation and payment was to be made by Cowden Livestock Company, appellant herein, after making sale of said cattle, collecting the proceeds and deducting certain expenses incurred and paid by Cowden Livestock Company.

The evidence was undisputed that Roy Adams represented himself as owner of the cattle to defendants and appellees, without authority from Cowden Livestock Company and was paid the proceeds legally due Cowden Livestock Company by defendants

and appellees herein, without authority from appellant. Roy Adams paid over to appellant, Cowden Livestock Company, a portion of these proceeds without disclosing to Cowden Livestock Company, the circumstances under which he had secured such funds from appellees. Said Roy Adams had theretofore been associated in other business undertakings with said George Porter and represented to Cowden Livestock Company that Porter was indebted to him and that it would be satisfactory with Porter if Adams retained Porter's compensation out of the sales proceeds, which Adams did. This representation was false.

The portion of the proceeds of the sales of these cattle turned over to Cowden Livestock Company by Adams was paid over by two checks which represented the proper part of the sales price due Cowden Livestock Company, less the compensation due Adams and Porter.

These checks were accepted by Cowden Livestock Company in ignorance of the true state of facts and in the belief that Adams actually had currently received the funds due from the sale of the cattle and had such funds in his possession or available for payment of the checks and unaware that defendants had ignored a letter of instructions from Cowden Livestock Company to appellees sent and delivered some two months previously, directing that sales of these cattle should be for the account of Cowden Livestock Company and proceeds remitted to Cowden Livestock Company.

One of these checks was not paid, whereupon plaintiffs made demand on defendants for payment of the balance due and upon refusal of defendants to make full payment, brought this action.

The trial court, among other Finding of Fact, made Finding No. 4:

" * * * that plaintiff had the sole right to direct the movement of said cattle, their disposition, and the time and manner of the sale thereof, and all proceeds from the sale of

said cattle were the property of plaintiff, subject to an accounting to said Roy Adams and George Porter as to the profit derived from such feeding operation; that the title to said cattle at all times remained in plaintiff."

Accordingly, it is the position of this appellant, that, as a matter of law, it was and is entitled to recover the full amount due from appellees upon the sale of said cattle or, in any event, the additional amount of such proceeds for which it would be accountable to George Porter and that the judgment as entered was and is erroneous to the extent it failed to allow such proper recovery.

Appellant, Cowden Livestock Company, relies upon the point and legal proposition that only the owner of personal property can authorize its sale and only the owner may collect and receipt for the sales proceeds; the mere fact that after the owner collects the sales proceeds he may be under obligation to pay to third parties who have no ownership or interest in such personal property, certain sums of money computed and determined in relation to the amount received by the owner, in payment for services rendered in connection with, or work performed upon such personal property by such third parties, does not justify or permit payment of the sales proceeds or any part thereof to such a third party and payment of such sales proceeds, or any part thereof, to such third party is not a defense in an action by the owner of such personal property to recover the sales proceeds.

Respectfully,

SNELL & WILMER,
By /s/ MARK WILMER,
/s/ JAMES A. WALSH,
Attorneys for Appellant,
Cowden Livestock Company.

[Endorsed]: Filed September 25, 1950.

No. 12,679

IN THE

United States

Court of Appeals

For the Ninth Circuit

HOWARD BROWN, individually and as surviving partner of the copartnership of Sinton & Brown, Dean Brown and Howard S. Brown, Florence R. Sinton and Silas D. Sinton, Jr., as Executors of the Estate of Silas D. Sinton, deceased, as members of and constituting the partnership known as Sinton & Brown,

Appellants-Defendants,

vs.

COWDEN LIVESTOCK CO., a corporation,

Appellee-Plaintiff

APPELLEE'S BRIEF

Upon Appeal from the District Court of the United States
for the District of Arizona

SNELL & WILMER

MARK WILMER

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703 Heard Building
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Attorneys for Appellee-Plaintiff

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Appellants-Defendants,

vs.

COWDEN LIVESTOCK CO., a corporation,

Appellee-Plaintiff

APPELLEE'S BRIEF

**Upon Appeal from the District Court of the United States
for the District of Arizona**

STATEMENT OF THE CASE

As the Court is aware, appellee-plaintiff is also prosecuting in this cause an appeal from the judgment rendered below by the District Court. As appellant, it has heretofore filed its Opening Brief and has set out therein its Statement of the Case. Accordingly, though we are not in entire agreement with the Statement of the Case contained in the Opening Brief of appellees-

defendants, we will not here burden the Court with a discussion of such Statement but respectfully direct the attention of the Court to the Statement of the Case made in our Opening Brief as appellant.

Hereafter, with the permission of the Court the parties will be referred to by name or as they appeared in the court below, i.e. appellants as defendants and appellee as plaintiff.

For the convenience of the Court in following our argument, we will preface each separate phase thereof with a re-statement of defendants' numbered Proposition to which our argument is directed.

ARGUMENT

I. The District Court Should Have Dismissed Plaintiff's Complaint for Nonjoinder of the Indispensable Parties-Plaintiff, the Plaintiff's Joint Venturers (Specifications I and V(A)).

It is evident from the mere statement of defendants' Proposition I that the same is bottomed entirely upon the assumption that Porter, Adams and plaintiff were in this case joint venturers. If defendants are wrong in this fundamental assumption then, of course, the entire Proposition must fall.

We submit that there is absent from this case one of the indispensable elements of a joint adventure, viz: joint control, or the equal right of each of the parties in the management and conduct of the undertaking. The authorities are legion upon the proposition that if the will or pleasure of one party is to control the others with respect to how, when, and where the agreement among them is to be performed, there is no joint adventure.

Balestrieri & Co. v. Commissioner, 177 F. 2d 867, 871 (CCA 9, 1949);

Carboneau v. Peterson, 1 Wash. 2d 347, 95 P. 2d 1043, 1055 (1939);

Beck v. Cagle, 46 Cal. App. 2d 152, 115 P. 2d 613, 618 (1941);

Rae v. Cameron, 112 Mont. 159, 114 P. 2d 1060, 1065 (1941);

48 C.J.S., Sec. 2, p. 810, n. 77.

Here, plaintiff had the sole right to control the movements of the cattle, the exclusive right to say when and how they should be sold or otherwise disposed of, and the sole right to receive the proceeds from the sale of the cattle (R. 74, 73, 67, 68, 113, 183, 193, 204). In other words, plaintiff alone had the power to make the decisions which would control the carrying out of the arrangement between himself, Porter and Adams. Accordingly, under the authorities above cited, no joint adventure existed in this case.

It should be noted that this is not a case where control initially existed jointly in the three parties but was by agreement placed or entrusted solely in the hands of plaintiff. Here, from the very inception of the arrangement among plaintiff, Porter and Adams, plaintiff, as owner of the cattle, retained the sole right to make the decisions which controlled the arrangement among the parties, and no right of control existed in either Porter or Adams (R. 74, 73, 67, 68, 113, 183, 193, 204).

Cf. *U. S. F. & G. Co. v. Dawson Produce Co.*, 200 Okla. 540, 197 P. 2d 978, 982 (1948).

But even if we were to concede, for argument's sake, that a joint adventure to any extent existed among Porter, Adams and plaintiff, such concession will avail defendants nothing, for it is well established that where a claim belongs to a partner or joint adventurer in his own right, he may sue alone thereon.

Wesson v. Galef, 286 F. 621, 622 (D.C.N.Y., 1922);

Beaumont Pasture Co. v. Sabine & E. T. Ry. Co., 41 S.W. 543, 544 (Tex. Civ. App., 1897);

Weikel v. Clarke, 33 Ky. L. 290, 109 S.W. 894, 895 (1908);

Knowles v. Sullivan, 182 Mass. 318, 65 N.E. 389 (1902);

47 C.J., Sec. 472, p. 958, n. 4;

68 C.J.S., Sec. 208, p. 680, n. 31, 32;

Cf. *Ross v. Willett*, 27 N.Y.S. 785, 786 (1894);

Cf. *Budd v. Scudder*, 52 N.J. Eq. 320, 26 A. 904, 905-906 (1893).

In this case the undisputed evidence shows, and the court below found, that plaintiff was at all times the sole owner of the cattle involved herein (R. 33, 73, 102), that plaintiff had the sole right to sell the same (R. 33, 74, 113, 193), and the sole right to receive the proceeds of any sale (R. 33, 193, 183). Clearly, plaintiff being the sole owner of the cattle and being the only person authorized to receive the proceeds from their sale, it is the only proper party plaintiff in this action.

II. The Plaintiff Has Received Payment of All Monies to Which It Is Entitled (Specifications II and V(A), (B) and (C)).

A. ADAMS, AS JOINT VENTURER OR AGENT OF PLAINTIFF, WAS AUTHORIZED TO RECEIVE THE MONIES PAID BY DEFENDANTS.

The first half of defendants' argument under Subdivision A of its Proposition II may be summarized as follows: There being no testimony in the record directly denying that Adams had authority to collect the proceeds of the sale of plaintiff's cattle, Adams, as agent for the plaintiff, had implied authority to collect such proceeds from defendants.

Defendants' statement that the record is barren of testimony directly denying Adams' authority to receive the sales proceeds is, we submit, not in accordance with the fact. Defendants are com-

pletely overlooking the testimony of Ray Cowden that, in a discussion with Adams which took place at the time plaintiff first learned that defendants had paid to Adams some part of the proceeds of the sale of the cattle, Cowden expressed dissatisfaction with the way the matter had been handled and reminded Adams that the sale of the cattle had been authorized by plaintiff on the basis that payment would be made to plaintiff (R. 86).

Further, defendants also overlook the testimony in the record to the effect that Adams himself informed Porter that all sales monies were to be sent to plaintiff (R. 193). No clearer or more conclusive proof of Adams' lack of authority to receive payment could be found than his own statement in that regard.

But even if the record were not thus clear regarding Adams' lack of authority to receive payment for plaintiff's cattle, defendants' argument is pointless under the facts in the case *because Adams never received or purported to receive monies from defendants as agent for plaintiff, or as agent for anyone else, but received such monies solely on his own account.*

The uncontroverted evidence in this case discloses that Adams, early in February, 1947, without the knowledge of plaintiff but purporting to be the sole owner of plaintiff's cattle, entered into an agreement with defendants which included the sale by Adams to defendants of a one-half interest in the cattle and an arrangement whereunder defendants would feed and finish the entire lot of cattle at their yards in Santa Maria, California (R. 225-228, 119). The undisputed evidence shows, also, that this agreement was made between Adams and defendants, and \$16,000.00 was paid under the agreement by defendants to Adams as the purported sole owner of the cattle, more than one month before Adams ever broached to plaintiff the subject of a feeding and finishing arrangement, or any other arrangement, with defendants (R. 69, 72). Further, every dollar of the \$169,612.53 collected by Adams from defendants was received by Adams on his own account,

in his own name, without the knowledge of plaintiff, and in violation of plaintiff's rights and interests (R. 230-234, 239-249, 147, 153).

In addition, plaintiff did not learn the facts regarding Adams' claim of sole ownership of the cattle and his sale of a one-half interest therein to defendants until the Fall of 1947, long after Adams had received all of the payments made to him by defendants (R. 119); and plaintiff did not learn the facts regarding the payments made by defendants to Adams pursuant to the agreement between them until some date after August 13, 1947 (R. 97, 98, 147, 153).

The rule is fundamental, we submit, that implied power can exist in an agent only with regard to actions or conduct which are usually or necessarily connected with the accomplishment of the purposes of the agency, and which are consistent with the best interests of the principal; and an act which is adverse to the interests of the principal, and done by the agent solely for the advancement of his own interests and purposes, is clearly outside any implied power of the agent.

American Southern Trust Co. v. McKee, 173 Ark. 147, 293 S.W. 50, 58 (1927);

2 C.J., Sec. 222, p. 582, n. 5;

2 C. J. S., Sec. 99, p. 1229, n. 72;

2 *Am. Jur.*, Sec. 87, p. 71;

Adams' express powers and duties under the arrangement among himself, Porter and plaintiff in this case were the following: to assist in securing a buyer for plaintiff's cattle; to arrange for shipment of the cattle after plaintiff had authorized shipment; to assist in securing feed; to inspect the cattle periodically and report on their progress; and to give plaintiff and Porter the benefit of his experience and judgment in carrying out the

arrangement among them (R. 111-113). Surely, it will not be contended in seriousness that an agent having such express powers and duties would customarily or necessarily possess, in order to accomplish the purpose of his employment, the implied power to secretly claim the sole ownership of his principal's property and to attempt to dispose of it in his own name and for his own account and purposes.

The authorities cited by defendants at pages 24-26 of their brief would be of some value if we had involved here an agent empowered to sell and the only question presented was the implied power of such agent to collect the proceeds of the sale. But to insist that such authorities establish the rule that an agent authorized to sell thereby obtains the implied authority to convert the principal's property to his own use and, indeed, to purport in his own name to sell an interest therein, is wholly untenable.

At pages 27-28 of their brief, defendants point to particular facts and circumstances in this case which, they contend, support the implication that Adams had power to receive from defendants the proceeds of the sale of plaintiff's cattle. The facts and circumstances are: (1) That Adams may have on former occasions handled and transmitted to plaintiff the proceeds of cattle sales; (2) That plaintiff's bank had cashed a draft executed on behalf of plaintiff by Adams; and (3) That Adams was authorized to show and, subject to plaintiff's advance approval, to sell plaintiff's cattle.

We are confident that it will not be held to be the law that the grant by a principal of authority to his agent to handle and transmit sales proceeds, or to draw drafts, or to show and consummate the sale of cattle, carries with it the implied power in the agent to claim the principal's property as his own, to deal with it in his own name and for his own purposes, and even to sell it without the knowledge of the principal but for his own account.

The latter part of defendants' argument under Subdivision A, Proposition II, is devoted to the contention that by accepting Adams' check for \$44,794.49 on July 16, 1947, and attempting thereafter for several weeks to obtain payment of said check, plaintiff acquiesced in Adams' collection of the sales proceeds from defendants and thereby vested in Adams the implied authority to collect such proceeds.

Defendants tacitly concede, in the last paragraph on page 31 of their brief, that their position can be maintained only if plaintiff, at the time of his alleged acquiescence, had knowledge of all material facts regarding Adams' receipt of the monies from defendants. But, admittedly, when plaintiff received Adams' check for \$44,794.49 it did so with the definite and proper belief and understanding that the sale of its cattle had been made for its account and had been accomplished very recently (R. 97, 141). It believed, also, and with reason, that whatever payment had been made by defendants to Adams had been made very recently (R. 97, 141), and that Adams then had available the funds from such payment or readily cashable assets representing such funds (R. 97, 98, 143). Plaintiff did not know until the early Fall of 1947 that Adams had in February, 1947, purported to deal with the defendants as sole owner of the cattle and to sell a one-half interest therein to defendants (R. 119); and plaintiff did not know until some date after August 13, 1947 that Adams, purporting to be sole owner of the cattle, had been paid monies by defendants on February 14, 1947, May 16, 1947, May 19, 1947, and July 5, 1947 (R. 97, 98, 147, 153).

Clearly, the plaintiff being thus ignorant of the facts and circumstances under which Adams received the monies from defendants, it cannot be contended that he acquiesced in such receipt.

B. PLAINTIFF ACCEPTED PAYMENT AND OTHER PERFORMANCE BY ADAMS AS FULL SATISFACTION OF ANY CLAIM AGAINST DEFENDANTS.

The long and short of defendants' argument under this Subdivision is that plaintiff accepted Adams' check for \$44,794.49 in

full payment of the proceeds due plaintiff from the sales of its cattle and that, consequently, plaintiff has no claim against defendants.

It is, of course, possible for a creditor to agree to discharge a debt by the acceptance of a check; but such discharge occurs only when the creditor has in fact so agreed, and the presumption is that the check is accepted on condition that it shall be paid.

Empire-Arizona Copper Co. v. Shaw, 20 Ariz. 471, 181 P. 464, 466 (1919);

40 *Am. Jur.*, Sec. 72, p. 763.

Unfortunately for defendants' position, in this case the evidence is undisputed, and the trial court found, that plaintiff accepted the check only upon the understanding and condition that it would be paid when presented (R. 36, 97, 98). Obviously, since the check was so conditionally accepted and it was not paid, it could not have the effect of discharging any indebtedness owing to plaintiff.

III. The Defendants Are Innocent Parties in This Matter, and Since It Was Plaintiff's Acts and Acquiescence for More Than Three Weeks in Adams' Collections of the Monies in Question Which Caused the Loss, Plaintiff Must Bear That loss (Specifications III and V(B)).

On May 15, 1947, plaintiff wrote to defendants at their office in Santa Maria, California, and in its letter plainly advised defendants that when sales were made of the cattle involved in this action, such sales were to be made for the account of plaintiff and the proceeds were to be remitted to plaintiff at the address given in plaintiff's letter (R. 81). Defendants' receipt of this letter about May 16, 1947, and their cognizance of plaintiff's directions regarding the sale of the cattle and the disposition of the proceeds therefrom, is admitted by one of the defendants, Dean Brown (R. 92, 218). That defendants elected to ignore plaintiff's notice and request is undisputed (R. 92, 83). Consequently, the finding by the trial court that defendants were upon notice of facts

sufficient to cause a reasonable person to make inquiry as to the true ownership of the cattle (R. 36), is amply supported and justified by the evidence.

Notwithstanding the notice given by plaintiff to defendants, defendants on approximately the same day they received plaintiff's letter mailed to Adams at Tucson their draft for the sum of \$129,314.45 (R. 239, 241). Adams did not present this draft for payment or cash the same until July 9, 1947 (R. 239). On May 19, 1947, defendants mailed to Adams at Tucson their check in the sum of \$4,843.81 and this check was cashed by Adams on May 24, 1947 (R. 243, 245). On July 5, 1947, defendants delivered to Adams at Santa Maria, California, their additional check in the amount of \$19,454.27, which was cashed by Adams on July 8, 1947 (R. 247-249).

In the light of these facts, it is plain that the entire loss involved in this case is due solely to the negligence or willfulness of defendants in completely ignoring the notice given to them by plaintiff in its letter of May 15, 1947. The \$129,314.15 draft which was mailed to Adams at about the same time that defendants received plaintiff's letter, was outstanding for almost two months, and defendants had ample opportunity, if they acted prudently or reasonably, to have stopped payment thereon (R. 286). All of the payments made by defendants to Adams subsequent to May 16, 1947, could have been avoided and, undoubtedly, the \$16,000.00 payment made to Adams by defendants on February 14, 1947 could have been recouped by defendants.

Defendants, recognizing that the loss here involved is directly traceable to their willful or negligent disregard of plaintiff's advice, attempt to escape responsibility therefor by contending that plaintiff had a later opportunity to prevent such loss. In this regard, defendants make the bland statement, at page 36 of their brief, that on July 16, 1947, plaintiff knew all of the material facts pertaining to Adams' collection of monies from defendants.

This statement is simply not true, as we have hereinbefore demonstrated (*ante*, p. 8).

Defendants further contend that plaintiff knew on July 16, 1947, that Adams had available certain cattle and that plaintiff should have given defendants an opportunity to attach these cattle. In the first place, plaintiff was never informed that Adams had any cattle available for attachment on July 16, 1947, plaintiff's information in this regard being Adams' statement that he had sold some cattle, from which he would have the proceeds by July 21, 1947 (R. 86, 98). In any event, there is no evidence in the record definitely establishing that Adams ever had the cattle which he purported to plaintiff to have sold, or that he had any proceeds coming from the sale of such cattle, the clear inference from the record being that Adams' story to plaintiff was a complete invention devised by Adams in order to postpone plaintiff's discovery of the actual facts regarding his appropriation of plaintiff's cattle.

We submit that the record is, as the trial court found (R. 36), completely devoid of any evidence that defendants suffered detriment or disadvantage by virtue of plaintiff's receipt of Adams' check and its attempts to collect the same; and we submit further, that the record conclusively establishes that the loss involved here occurred wholly and solely by reason of defendants' failure to act prudently and reasonably in the light of the facts brought to their knowledge by plaintiff in its letter of May 15, 1947.

IV. The Plaintiff in Settling with Adams, Accepting His Checks, and Acquiescing Thereafter for More Than Three Weeks in Adams' Collection of the Monies, Thereby Ratified His Collections (Specifications IV and V(C)).

Defendants have prefaced their argument under Proposition IV with what they claim are conclusions supported by the record in this case (Appellants' Opening Brief, p. 37). We disagree emphatically with defendants' statement, and we will here repeat the alleged conclusions, with our answer to the same.

(1) "Plaintiff, on July 16, 1947, knew all of the material facts pertaining to Adams' collections." The inaccuracy of this statement is apparent from our discussion of the evidence in the record in our argument of Proposition II (*ante*, p. 8).

(2) "Plaintiff approved and affirmed these acts of Adams." Obviously, since plaintiff did not know the facts regarding Adams' collections from defendants, he could not have approved or affirmed Adams' acts in that regard.

(3) "Adams in making the collections was intending to act for and on behalf of the plaintiff-Porter-Adams arrangement." We have heretofore pointed out that every dollar collected by Adams from defendants was received by Adams on his own account, in his own name, without the knowledge of plaintiff, and in violation of plaintiff's rights and interests (*ante*, pp. 5, 6).

(4) "While Adams in making the collections did not purport to defendants to be acting for and on behalf of plaintiff, defendants knew at the time that they paid over the monies to Adams that he was acting for and on behalf of plaintiff." This statement is directly at variance with the testimony of defendant Howard Brown (R. 260), and the testimony of defendant Dean Brown (R. 216). There is no testimony anywhere in the record that defendants ever knew or dealt with Adams other than as the sole owner of the cattle.

Defendants concede that under the rule applied by the majority of courts the question of ratification by plaintiff of Adams' collections from defendants is simply not in this case, because Adams never purported to defendants to be other than the sole owner of the cattle at the time he received the collections. Defendants desperately attempt, however, by reference to criticisms of the majority rule, to persuade the court to open the door that is locked to them. We think it a sufficient answer to defendants' argument to point out that the merits and demerits of both the ma-

jority and minority rules have been studied and considered by the courts of this country for a half century past, with the result that the courts of but two states—Massachusetts and Washington—have professed to find anything of merit in the rule for which defendants here contend. Surely, if the minority views were as logical and sound as defendants would persuade the court, a half century of consideration would not have left them the rule in but two jurisdictions.

Apart from the fact that Adams did not purport to defendants to be an agent, there are additional reasons why ratification is not in this case. In the first place, defendants concede that even under the rule followed in Massachusetts and Washington, it is necessary in order to have a ratification that the act should have been done by one who was *in fact* acting as an agent. Here, Adams in making collections from defendants was acting solely for himself, for his own purposes, and contrary to the interests of plaintiff.

In addition, it is fundamental law that in order for a ratification of an unauthorized act or transaction of an agent to be binding and valid, the principal must have full knowledge, at the time of the ratification, of all material facts and circumstances relating to the unauthorized act or transaction. In Arizona, this rule is established to the extent that ratification of an unauthorized act of an agent is not valid and binding where the principal has misunderstood or mistaken material facts, even though he may have wholly omitted to make inquiry concerning them, and his ignorance and misunderstanding might have been corrected by the use of diligence on his part to ascertain the true material facts.

Valley Bank of Phoenix v. Brown, 9 Ariz. 311, 83 P. 362, 364 (1905);

Mutual Benefit H. & A. Ass'n v. Neale, 43 Ariz. 532, 33 P. 2d 604, 608 (1934);

2 C.J.S., Sec. 42, p. 1081 *et seq.*

In this case, the conduct of plaintiff which defendants contend amounted to ratification, i.e. plaintiff's acceptance of Adams' check for \$44,794.49, was performed by plaintiff while it was under a thorough misapprehension of the facts regarding Adams' collections from defendants and while it was without any accurate knowledge regarding material facts relating to such collections by Adams from defendants (R. 97, 98, 119, 141, 147, 153). Obviously, therefore, under the rules of law applicable, no valid or binding ratification of Adams' acts was made by plaintiff.

CONCLUSION

Plaintiff most respectfully insists that the judgment of the District Court is proper and right and should be affirmed.

Respectfully submitted,

SNELL & WILMER

JAMES A. WALSH

MARK WILMER

Attorneys for Appellee-Plaintiff

No. 12,679

IN THE
United States
Court of Appeals
For the Ninth Circuit

COWDEN LIVESTOCK Co., a corporation,
Appellant-Plaintiff,

VS.

HOWARD BROWN, individually and as surviving partner of the copartnership of Sinton & Brown, and SINTON & BROWN, a copartnership composed of Howard Brown and Richard Roe Sinton and John Doe Sinton,

Appellees-Defendants.

Appellees-Defendants' Answering Brief

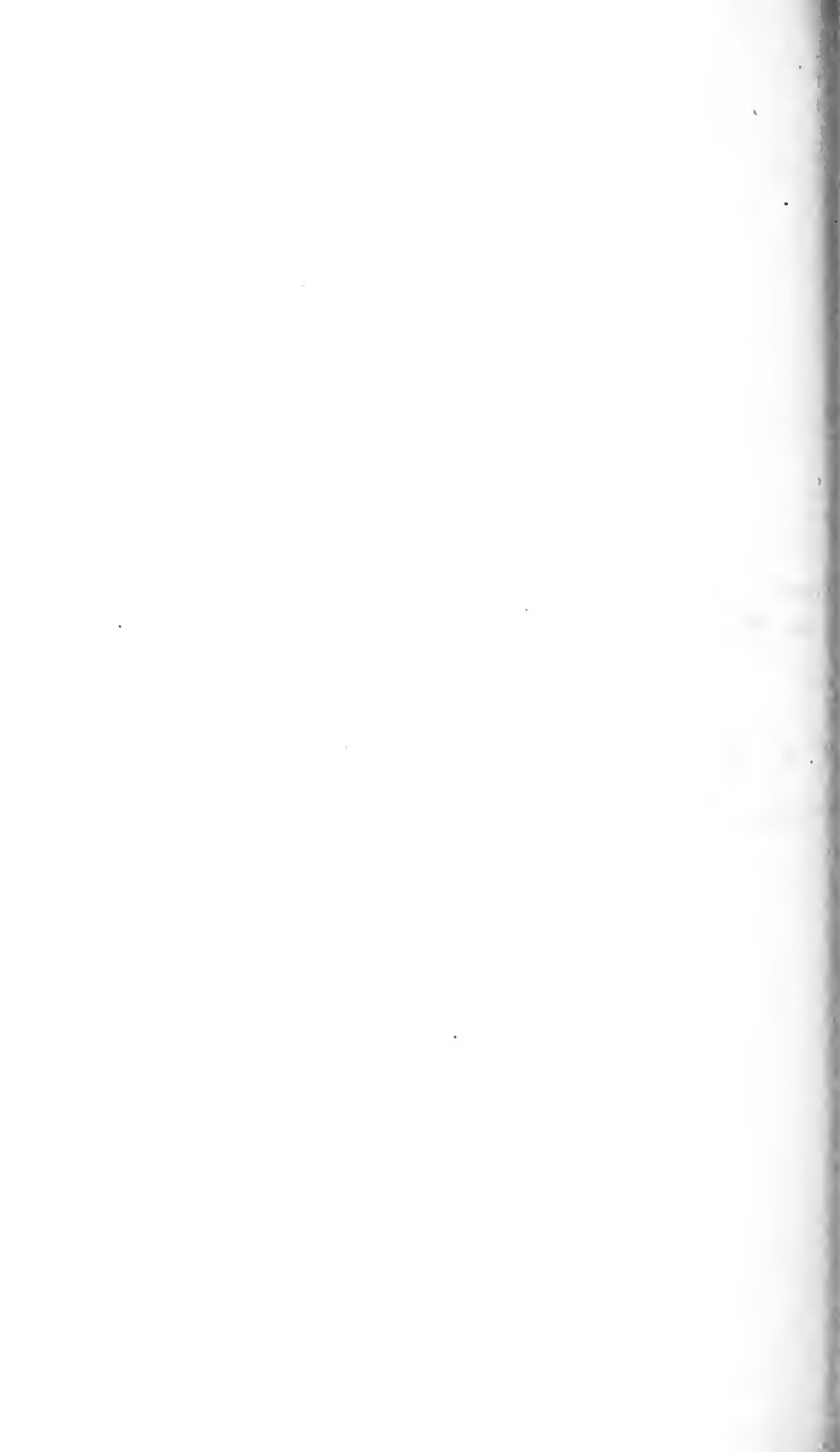
Upon Appeal from the District Court of the United States
for the District of Arizona

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Appellees-Defendants.

Appellees-Defendants' Answering Brief

Upon Appeal from the District Court of the United States
for the District of Arizona

Plaintiff's appeal seeks to have this Honorable Court increase the lower court's judgment by the amounts which plaintiff allegedly owes (1) Porter and (2) the assignee of the deceased Adams, in each instance, \$6,409.02. Complete rebuttal to all of plaintiff's contentions is found in de-

fendants' Opening Brief on their appeal. There is, however, another reason why plaintiff's contentions are fallacious: the elementary rule of law is that the payment of a debt by one who is not a party to the contract, although made without assent of the debtor, extinguishes the debt. 40 *Am. Jur.*, p. 726, Sec. 22.* This is only to say that: "A payment or other performance by a third person, accepted by a creditor as full or partial satisfaction of his claim, discharges the debtor's duty in accordance with the terms on which the third person offered it. . . ." *Restatement of the Law of Contracts*, Section 421; see *Grouf v. State Nat. Bank of St. Louis*, 76 F.2d 726, 730 (C.C.A. 8 1935).

The facts here are that defendants paid Adams (the plaintiff's alleged creditor) his \$6,409.02 and plaintiff knew thereof and acquiesced therein. Plaintiff's president testified:

"Q. You knew (at the time of the plaintiff-Adams settlement) that Mr. Adams had directly collected his part of the proceeds?

A. That is true, he said he had." (R. 96)

It was subsequent to this (after October 3, 1947) that plaintiff received notification of Adams' assignment to the Slash Cattle Company (R. 174-177) and defendants never were advised of such assignment.

With respect to the \$6,409.02 allegedly owed Porter, which defendants paid Adams, Porter's testimony was:

"Q. Mr. Porter, have you written off on your books those \$6,000 that would have been coming to you had

*The citations contained in plaintiff's opening brief are so clearly not in point as to be unworthy of comment.

the settlement been completed by the payment of the money?

A. When I heard Roy Adams killed himself, I did. (R. 197)

Q. Just one more thing on that, Mr. Porter. You wrote it off, I believe, this \$6,000, when you found out that Roy Adams had committed suicide, isn't that true?

A. Well, in fact I had wrote it off before then.

Q. You wrote it off because Roy Adams was in a poor financial condition, to your knowledge, isn't that right?

A. That is right.

Q. You didn't think you could collect it from Roy Adams?

A. I didn't see a chance." (R. 205, 206).

Even if the following testimony of Porter:

"Q. Are you at the present time, George, looking to the Cowden Livestock Company to collect your portion of the gain or profit on those cattle?

A. I'd appreciate it.

Q. You would expect it?

A. You bet." (R. 196),

could be construed as a non-affirmance by Porter of Adams' collection of his (Porter's) part of the proceeds, that non-affirmance did not come until February, 1949, seventeen months after the plaintiff-Adams settlement at which Adams purported to act on behalf of Porter (R. 95), and approximately the same amount of time after Porter had written off the Adams debt to him. (R. 197, 205, 206) A clearer case of ratification could hardly be made out.

For the reasons stated above and in their opening brief defendants' respectfully request the Court to enter judgment in their favor.

Respectfully submitted,

EVANS, HULL, KITCHEL & JENCKES
NORMAN S. HULL
JOHN E. MADDEN

*Attorneys for Appellees-
Defendants*

No. 12,679

IN THE
United States
Court of Appeals

For the Ninth Circuit

HOWARD BROWN, individually and as surviving partner of the copartnership of Sinton & Brown, and SINTON & BROWN, a copartnership composed of Howard Brown and Richard Roe Sinton and John Doe Sinton,

Appellants-Defendants,

VS.

COWDEN LIVESTOCK Co., a corporation,
Appellee-Plaintiff.

Appellants-Defendants' Reply Brief

Upon Appeal from the District Court of the United States
for the District of Arizona

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PAUL P. O'BRIEN,

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HOWARD BROWN, individually and as surviving partner of the copartnership of Sinton & Brown, and SINTON & BROWN, a copartnership composed of Howard Brown and Richard Roe Sinton and John Doe Sinton,

Appellants-Defendants,

vs.

COWDEN LIVESTOCK Co., a corporation,

Appellee-Plaintiff.

Appellants-Defendants' Reply Brief

Upon Appeal from the District Court of the United States
for the District of Arizona

INTRODUCTION

The assertions in plaintiff's briefs, when considered in connection with the references made to the record, disclose that plaintiff relies upon: (1) certain irrelevant conclusions which could divert the Court's attention from the real issues of the case as framed by plaintiff's complaint (R. 2-5) and defendants' answer (R. 19-25), and (2) certain errone-

ous conclusions based upon the self-serving statements of plaintiff's corporate officers which are in conflict with the clear fact testimony of the same officers and the documentary evidence.

Plaintiff's brief makes much of the fact that Adams, upon his original contact with defendants, purported to sell them a one-half interest in the cattle, a fact said to be unknown by plaintiff until the fall of 1947 (Br. 6, 7, 8). Since it is uncontroverted that defendants, by virtue of authority delegated by Adams, had authority to sell the cattle for the amounts charged, with the duty to split the profits (R. 2-5, 70, 71, 74-76, 119-121), and that they actually turned over to Adams the half of the profits that belonged to the plaintiff-Porter-Adams arrangement (R. 105, 106), it is merely deft smokescreening to quibble over the clearly irrelevant questions of whether defendants, in making the sales, were doing so as mere agents or as part owners of the cattle, or whether defendants, in remitting to Adams, were doing so as mere agents or as part owners of the proceeds. Plaintiff did not allege and does not contend that defendants lacked authority to sell the cattle for the prices charged; the question before the Court is whether Adams had authority to collect the plaintiff-Porter-Adams half of the sale proceeds.*

Plaintiff assumes that Adams, in making the collections, was acting contrary to plaintiff's interest (Br. 6, 7, 11). If,

*Despite the irrelevancy of plaintiff's conception of the deal with defendants, the stress which plaintiff places thereon leads defendants to point out one feature of this conception that borders on the ridiculous. According to plaintiff's president, defendants were to advance plaintiff .15¢ per pound at the outset and "make a further advance of .01¢ per pound at the time settlement was completed." (Plaintiff's Statement of Case, p. 4). Why a "further advance" would be in order when "settlement was completed is beyond comprehension.

however, Adams had implied authority to make the collections, then the contention that he may have intended to misappropriate and later misappropriated the money so as to be acting adversely to plaintiff's interests certainly is irrelevant to the resolution of the issues in this case. Furthermore, plaintiff's attempt throughout its brief to paint Adams as a sort of "bogey-man" who, from the outset, was plotting the "appropriation of plaintiff's cattle" (Br. 11) is totally unconvincing: If Adams were the thief that plaintiff would make him out, he certainly acted strangely in choosing to steal only \$44,494.49 of the \$169,612.53 which was available to him.*

Three of plaintiff's conclusions are that: (1) plaintiff did not know all of the material facts pertaining to Adams' collections (Br. 8, 10-13); (2) plaintiff did not affirm and acquiesce in Adams' collections (Br. 5, 12); and (3) Adams in making the collections did not intend to act for and on behalf of the plaintiff-Porter-Adams arrangement (Br. 5, 6, 12). Whether or not these conclusions are warranted can be ascertained only from the testimony of plaintiff's corporate officers and the surrounding circumstances. For this reason all such testimony is catalogued and exhibited in two appendices to this brief. Appendix "1" sets forth all of the testimony bearing on what plaintiff knew on July 16, 1947 (the date of the plaintiff-Adams settlement), and Appen-

*Adams was dead and unable to defend such charges. There is, however, nothing in the testimony pertaining to his relationship to, and dealings with plaintiff (all of which necessarily came from plaintiff's officers), which supports such a conclusion. Certainly plaintiff didn't treat Adams like a thief for in Adams' words: "I had full charge of same (the cattle) to handle as I saw fit. * * * I went to Cowden Livestock Company office in Phoenix and made a settlement with them and it was satisfactory at the time. * * *" (R. 255).

dix "2" sets forth all of the testimony bearing on what plaintiff did after the July 16, 1947, plaintiff-Adams settlement.

Any realistic view of this testimony compels the conclusions that, notwithstanding the self-serving statements of plaintiff's officers, (1) plaintiff did know all of the material facts pertaining to Adams' collections; (2) plaintiff did affirm and acquiesce in Adams' collections; and (3) Adams in making the collections did intend to act for and on behalf of the plaintiff-Porter-Adams arrangement. The self-serving statements of plaintiff's officers are also refuted by the documentary evidence. For example, when plaintiff's secretary-treasurer was questioned about Exhibit "C" (R. 134, 135) during plaintiff's case, his testimony was unequivocal that:

"Q. Were your records completely silent as to the 44,000?

A. That is correct." (R. 161)

"Q. Is that your entire accounting document; there was no other document other than that?

A. None whatsoever." (R. 158)

Later, during defendants' case, when confronted with the damning Exhibit "J" (R. 211), which proved to be the missing second page to Exhibit "C" and which contained the telltale final entry "Due from Adams . . . \$44,794.49," the witness was forced to renege on his earlier testimony as follows:

"Q. Is there not an entry on there, on this second sheet, showing 'Due from Adams \$44,794.49'?

A. That is correct." (R. 213)

"Q. Do you have another copy of this sheet? (Exhibit "J")

A. Of this sheet, yes, sir, I have a yellow copy.”
(R. 213)

Under these circumstances—the trial court sitting without a jury and, seventeen months after trial, uncritically accepting in toto the plaintiff’s resolution of fact issues, where the evidence is partly oral and the balance is written and deals with undisputed facts, and where the written evidence and undisputed facts render the credibility of the oral testimony of plaintiff’s officer witnesses totally untrustworthy—this Honorable Court may ignore the trial judge’s findings and substitute its own. *Orvis v. Higgins*, 180 F.2d 537, 539, 540 (C.C.A. 2 1950); cert. denied U.S., 95 L.Ed. 20 (1950); *Dollar v. Land*, 184 F.2d 245, 248, 249 (C.C.A. D.C. 1950) cert. denied U.S., 95 L.Ed. 75 (1950); *Pacific Portland Cement Co. v. Food Mach. & Chem. Corp.*, 178 F.2d 541, 548 (C.C.A. 9 1949); *Home Indemnity Co. of New York v. Standard Acc. Ins. Co.*, 167 F.2d 919, 923 (C.C.A. 9 1948).

ARGUMENT

I. The District Court Should Have Dismissed Plaintiff's Complaint for Nonjoinder of the Indispensable Parties-Plaintiff, the Plaintiff's Joint Venturers.

A. PLAINTIFF, PORTER AND ADAMS WERE ENGAGED IN A JOINT VENTURE.

Plaintiff, choosing to ignore the two cases cited by defendants as directly in point (*Mid-Columbia Production Credit Ass'n v. Smeed*, 171 Ore. 140, 136 P.2d 255 (1943); *Moore v. Diehm*, 200 Okl. 664, 199 P.2d 218 (1948) followed in *Moore v. Beier*, Okl., 210 P.2d 359 (1949)), contends that the plaintiff-Porter-Adams arrangement was not a joint venture because (says plaintiff) there was lack-

ing therefrom "the equal right of each of the parties in the management and control of the undertaking" (Br. 2). As pointed out in Appellants' Opening Brief (pp. 15, 16), each of the three parties to the venture did actually participate in the management thereof. Assuming, however, *arguendo*, that as plaintiff contends, plaintiff had the sole control of the decisions governing the venture, this fact does not militate against the conclusion that the arrangement was a joint venture. For as stated in the treatise cited by plaintiff (Br. 3):

"... one joint adventurer may be intrusted with the actual control of the enterprise without changing its status as a joint adventure. . . ." (48 *C.J.S.* 811, Section 2)

Indeed, another case cited by plaintiff, *United States Fidelity & Guarantee Co. v. Dawson Produce Co.*, 200 Okl. 540, 197 P.2d 978, 982, 983 (1948), not only recognizes that mutual control can be placed in the hands of one joint venturer, but also holds that the status of the legal "title" to property (about which plaintiff dwells at length) is not determinative of the question of the existence of a joint venture.

Analysis of the four cases cited by plaintiff reveals why plaintiff's Statement of the Case is completely silent about the undisputed fact that each of the parties to the plaintiff-Porter-Adams arrangement was to bear equally any losses resulting therefrom. Two of these cases contain the crucial affirmative finding that the arrangement there considered did not involve any loss-sharing feature. *Joe Balestrieri & Co. v. Comm. of Int. Rev.*, 177 F.2d 867, 872 (C.C.A. 9 1949); *Beck v. Cagle*, 46 Cal. App. 2d 152, 115 P.2d 613,

619 (1941). Another, *Rae v. Cameron*, 112 Mont. 159, 114 P.2d 1060 (1941), supports defendants' position that the plaintiff-Porter-Adams arrangement was a joint venture, and the other—*Carboneau v. Peterson*, 1 Wash. 2d 347, 95 P.2d 1043 (1939), a tort case—involves an automobile trip "joint adventure" situation, which is clearly not in point.

Plaintiff's attempt to gloss over the loss-sharing feature of the plaintiff-Porter-Adams deal, is recognition that such a feature is foreign to a mere agency relationship, and it constitutes a tacit admission that the deal was a joint venture.

B. LESS THAN ALL JOINT VENTURERS CANNOT SUE ON OBLIGATION TO JOINT VENTURE.

The "even if" argument advanced by plaintiff to avoid the fatal effect of the joint venture relationship to its lawsuit, is that "where a claim belongs to a joint adventurer *in his own right*, he may sue along thereon" (Br. 3). This unquestionably is the rule of law as set forth in the treaties and in some of the cases cited by plaintiff. Unfortunately for plaintiff, however, the claim here does not belong to plaintiff "in his own right." Although legal title to the cattle remained in plaintiff until sold by defendant, the cattle were clearly part of plaintiff's contribution to the joint venture. That title was voluntarily relinquished by plaintiff when defendants made the sales authorized by plaintiff. The resulting proceeds, to which plaintiff could not possibly claim exclusive title and for which plaintiff is now seeking complete recovery, were the asset of the joint venture. With the sale of the cattle, plaintiff's title thereto was extinguished, and its only right to a portion of the debt owed by defendants on the sale rested in its undi-

vided interest in the joint venture. Therefore, none of the cases cited by plaintiff is in point, and the rule of this court as set forth in defendants' opening brief (pp. 19-21) compels the dismissal of plaintiff's complaint.

II. The Plaintiff Has Received Payment of All Monies to Which It Is Entitled.

A. ADAMS, AS JOINT VENTURER OR AGENT OF PLAINTIFF, WAS AUTHORIZED TO RECEIVE THE MONIES PAID BY DEFENDANTS.

As to plaintiff's contentions with respect to this and each of defendants' subsequent arguments, the Court is referred to the Introduction and the Appendices hereto.

Defendants reassert that there is *not a whit of testimony directly denying that Adams had authority to make the collections or establishing that he was forbidden or had agreed not so to act*. With respect to the two threads of testimony by which plaintiff (Br. 5) would refute that statement, the Court will observe that:

- (1) Plaintiff's expression of dissatisfaction of Adams' collection came *after* the act and therefore could hardly be said to have forbidden the completed act.
- (2) Porter's statement that all monies were to be sent to plaintiff fails to negative, and it impliedly supports, the conclusion that *both* Adams and Porter had authority to collect the sale proceeds with the duty to remit to plaintiff.

Since implied authority is as effective as express authority (*Restatement of the Law of Agency, Section 7*), the fact that Adams "never purported to receive monies from defendants as agent for plaintiff" has no bearing on this

point. "Purporting to act" plays no part where implied authority exists. Plaintiff's ill-chosen reference to this factor at this portion of the argument convinces that, obsessed with the technicalities of the majority rule of ratification, it would attempt to apply those technicalities to a situation where that rule has no application.

Where a principal by word (express authority) or act (implied authority) grants an agent authority to collect monies, it makes no difference whether the agent at the time of collection purports to act for and on behalf of his principal or otherwise. Whether the situation may be different where "apparent authority"* is involved (see *Restatement of the Law of Agency, Section 8*), is of no concern to this action, since no one contends that "apparent authority" existed.

Plaintiff's argument (Br. 6) to the effect that an act which is adverse to the interests of the principal is outside any implied authority of the agent constitutes another example of plaintiff's reliance upon legal generalities which are inapplicable to the issue of this case which is: Did Adams have authority to collect the monies in question? The collection of monies by an agent on behalf of his principal cannot be said to be adverse to a principal's interest and certainly is not within the rule relied upon. Defendants have never contended that Adams had "implied authority to convert the principal's property to his own use." Furthermore, if Adams had authority to make the collections in question, any hidden intent to steal the funds which

*Authority held to exist as a matter of law where no actual (express or implied) authority exists but where a principal by word or act has indicated to a third party that authority does exist in an agent, sometimes called "agency by estoppel."

plaintiff would attribute to Adams, could hardly defeat that authority.

As to plaintiff's other remarks defendants observe that plaintiff's blase treatment (Br. 7) of the law of agency as it exists in Arizona is hardly an answer to the irrefutable logic of the authorities found in pages 23-32 of defendants' opening brief.

B. PLAINTIFF ACCEPTED PAYMENT AND OTHER PERFORMANCE BY ADAMS AS FULL SATISFACTION OF ANY CLAIM AGAINST DEFENDANTS.

Plaintiff's argument completely fails to destroy the analogy of the situation in *Neavitt v. Upp*, 57 Ariz. 445, 114 P.2d 900, 902 (1941) (Appellants' Opening Brief, p. 32, 33).

III. The Defendants Are Innocent Parties in This Matter, and Since It Was Plaintiff's Acts and Acquiescence for More Than Three Weeks in Adams' Collections of the Monies in Question Which Caused the Loss, Plaintiff Must Bear That Loss.

With respect to plaintiff's contentions on this argument, suffice it to note that plaintiff is totally unable to give any reasonable explanation why defendants would "willfully disregard" any letter which might be designed to protect them from misdirecting payment.

IV. The Plaintiff in Settling with Adams, Accepting His Checks, and Acquiescing Thereafter for More Than Three Weeks in Adams' Collection of the Monies, Thereby Ratified His Collections.

Plaintiff's contentions as to this argument are answered in the appendices except as to one point: Defendants' statement that "while Adams in making the collections did not purport to be acting for and on behalf of plaintiff, defend-

ants knew at the time that they paid over the monies to Adams that he was acting for and on behalf of plaintiff" is, as plaintiff says (Br. 12), at variance with the testimony of defendants. As explained at page 45 of Appellants' Opening Brief the statement is based upon the lower court's finding, lifted from the mouth of plaintiff, that defendants had notice of plaintiff's interest in the cattle and therefore Adams' agency by virtue of the letter of May 15, 1947. Since plaintiff relied upon the technicalities of the majority rule of ratification, it can hardly be expected that defendants will not take advantage of the finding that was advanced to support those technicalities.

CONCLUSION

Defendants submit that they paid plaintiff in full when they paid Adams, plaintiff's joint venturer. Even under plaintiff's theory plaintiff at least selected Adams to deal with defendants concerning the cattle. Adams did deal with defendants concerning the cattle and arranged to have the cattle shipped to defendants for feeding and sale. Defendants performed all of their obligations under the deal and made full payment to Adams. Payment to Adams was payment to plaintiff, because Adams possessed implied authority to receive payment for plaintiff.

Plaintiff's attempt to recoup its self-inflicted loss from defendants by branding Adams (its own man) as a thief, comes with particular ill grace when, for twenty-four days after it settled with Adams, it made no objection to the fact that Adams "desired to use * * * temporarily" the monies for which it now seeks recovery (R. 35, 36) and even consented that he do so.

Law and justice indicate that plaintiff should not prevail. For the reasons stated in this and in their Opening Brief, defendants respectfully request that the Court enter judgment in their favor.

Respectfully submitted,

EVANS, HULL, KITCHEL & JENCKES

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807 Title & Trust Building

Phoenix, Arizona

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Defendants.*

(Appendices follow)

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(ALL QUESTIONS HEREIN DESIGNATED WITH AN "X" WERE ASKED BY DEFENDANTS' COUNSEL; ALL OTHERS WERE ASKED BY PLAINTIFF'S COUNSEL.)

What Plaintiff Claimed Not to Know on July 16, 1947— Plaintiff's President's Testimony

A. "No, I didn't know of it." (R. 102)

A. "No, I did not." (R. 128)

A. "Some time in August." (R. 102)

A. " * * * It was after that date [Aug. 1961] that I acquired knowledge that [the] [redacted] had been made to Adams." (R. 101)

A. "I found that out after August 1961."

A "I didn't know that he had" (R 1)

A " " " " I knew he at least had a
the account. I didn't know whether
in full or what the arrangement was

A "I would not have " (R 153)

Treasurer's Testimony
60, 1811

Q No 1 didn't I that there was pro
the lead there and the witness
Simon & Brown had furnished to
He forwarded them to us in that
I showed you over there

Q And from all of the figures I
this yellow sheet this settlement

there is nothing in what is known there to indicate that they paid anybody.

A: I think that is right.

Q: So I did not. You could not tell me I had not talked to Roy.

A: I assumed that there had been no would follow these documents.

Q: But we assumed the first knewed the Valley Bank the latter part of A.

Plaintiffs' President's Testimony

Q "Did he pay you the money which was coming to you, Mr. Cowden?"

A "He gave the Cowden Trust Co. Company one check for \$112,000 and another check for \$4,000 some odd dollars, and he said, 'Now, put this \$112,000 check in the bank because I have the money there.' He said I bought some cattle down here which we will receive Monday, and I used a part of this money to pay for them. Hold the \$4,000 check until Saturday and put it in the bank it will be good." (R. 86)

Q "Now, Mr. Cowden, the figure of \$4,000 some odd dollars which was set forth in the second check, how do you remember that with the \$7,000 odd dollars which was used for the first check?"

A "I believe you stated that he told you that he had already used some of the money which Simon & Brown had paid him."

Q "And didn't have it then that he could turn it over to you?"

A "I presume it was your understanding, then, that he either had that money on the assets which had been put in it or to which you could look for payment of the money, didn't it?"

Q "The Wednesday?"

A "It was on the basis of that understanding that you accepted the check?"

Q "What if anything did you do about it, Rex?"

A "I did just as I told you. We put the \$112,000 check in the bank the next day." (R. 86)

Q "And was that paid?"

A "That was paid." (R. 86)

Q "What if anything happened to the \$11,000 check?"

A "It was returned on account of insufficient funds on the 25th of July of July." (R. 86)

Q "And what if anything did you do when that occurred?"

A "Mr. Clements—I was out of town and Mr. Clements immediately contacted Mr. Adams and he told him to put the check back in it, would he all right." (R. 87)

Q "And did you not the check back in it?"

A "Yes, sir." (R. 87)

Q "And when it came, happened?"

A "When the check was put in for collection and held probably a week. It contacted the bank and they said there was no funds available for payment." (R. 87)

Q "At that time, anything did you do?"

A "I contacted Mr. Adams. He came to Phoenix with me." (R. 87)

Q "It was the first week in August when you went out of the State, is that right?"

A "That is true. I had to go to Albuquerque. New Mexico attended a meeting of the committee on the East and South. I was in." (R. 87)

Q "It was when you returned from there that you learned the check had not been paid?"

A "That is correct." (R. 87)

Q "Did you get anything and then communicate with Simon & Brown at that time?"

A "We immediately came again from Albuquerque. I spent one or two days in Phoenix taking care of some of my business there, and I was, right on to Phoenix. Mr. Adams had been here, and I was going to that. But he did not come to see Mr. Clements. I was out of town myself, and on Saturday of that week the 9th I think I was. I wrote a letter and said at the request I had to Simon & Brown, and asked them to put a return check to me. It was then received." (R. 87)

Q "Plaintiff's Secretary, I believe, said that Mr. Adams had hopes that we would collect that check?"

A "Yes, sir." (R. 87)

WEDNESDAY—JULY 16, 1947
Plaintiff takes two of Adams' personal checks \$112,000.00 and \$4,794.49 and agrees not to deposit latter until Saturday, July 19, 1947. Adams promises to have funds to cover same by Monday, July 21, 1947, stating to have used a portion of the money from the sheep sold by defendants to buy other cattle, the proceeds from which he will have by that time.

THURSDAY—JULY 17, 1947
Plaintiff deposits Adams' \$112,000.00 check and bank immediately gives proceeds to plaintiff.

THURSDAY—July 19, 1947
Adams' \$44,794.49 check returned to plaintiff for insufficient funds.

WEDNESDAY—July 23, 1947
Adams' \$44,794.49 check returned to plaintiff for insufficient funds.

THURSDAY—August 1, 1947
Plaintiff, Secretary-Treasurer contacts Adams. Adams declines to refund check, that same will be all right plaintiff's agent deposits check.

THURSDAY in week (implied)—July 24, 1947
Bank declines plaintiff's check then still has no Adams funds available to cover check.

EARLY AUGUST
Plaintiff's President again contacts Adams.

EARLY AUGUST (before August 6, 1947)
Plaintiff determines Adams' \$44,794.49 check is uncollectible.

SATURDAY—August 9, 1947
Plaintiff writes defendant for the first time since May 1947 and demands \$57,812.57.

Q "And that no amount you accepted from Roy Adams two checks, did you not?"

A "Now you, acting for the Cowden Livestock Company and perhaps for Porter, actually did settle with Roy Adams on this three-party arrangement that the three of you had, did you?"

Q "And the only thing left to be determined was the payment on the \$11,000 check. If that check had been paid it would wipe the books clean, wouldn't it, between you and Adams?"

Q "Then at the same time you took this \$4,000 check?"

Q "Mr. Adams told you at that time that that check would not be good until, uh, the first of next week, wouldn't that be true?"

Q "And then he went further and said that the money would be in the bank by Monday?"

Q "Did you wonder why he had given you a check that was not to be deposited at the time it was dated?"

Q "Did you assume him to be in a solvent condition when he gave you this \$4,000 check with the request not to present it immediately?"

Q "One was, I believe, in the amount of \$112,000?"

Q "Was that Adams' personal check?"

Q "And that was good?"

Q "Now, when Mr. Adams gave you this check for \$112,000, you deposited that check immediately, didn't you?"

Q "And that check was paid?"

Q "And that money came out of the Roy Adams personal bank account, isn't that correct?"

Q "Did you know at that time how the money which it represented got into his account?"

Q "No,"

Q "Yes, and did he tell you that that check was, or would be paid when deposited, or make any statement concerning it?"

Q "Did you hold that \$11,000 check and not deposit it prior to the time that he had asked you to hold it up?"

Q "That was four days, Wednesday to Saturday?"

Q "Was the check returned for insufficient funds?"

Q "And then when was it that Mr. Adams informed either you or Mr. Clements to re-deposit that check?"

Q "You know approximately what day of the week it was?"

Q "That would make it be about what date in July?"

Q "And then you presented this for payment, did you, this \$11,000 check?"

Q "And when did you determine that that check was uncollectible?"

Q "When, before the 7th of August, or will say?"

Q "Did you inform Simon & Brown that Mr. Adams' check had not been paid or cashed?"

Q "On August?"

Q "Did you make any complaint to Simon & Brown prior to the 9th of August concerning the fact that Simon & Brown had settled with Roy Adams on this transaction?"

Q "That is correct." (R. 105)

Q "In the manner in which I have testified to, yes." (R. 116, 119)

Q "Yes, sir." (R. 119)

Q "Yes." (R. 142)

Q "He told me to hold it until Saturday and deposit it on Saturday of that week." (R. 142, 143)

Q "The money would be there." (R. 143).

Q "He explained it by saying that he had used a portion of the money out of these items to buy another bunch of cattle which he shipped on Monday and Tuesday before he came here on Wednesday, and would have the return from that shipment." (R. 143)

Q "Well, I believed what he told me in saying that he had used a part of the money to buy this bunch of cattle. Although he didn't have the cash, I thought he had something that he had spent the money for." (R. 143)

Q "That is correct." (R. 105)

Q "Yes, sir." (R. 105)

Q "Yes, sir." (R. 105)

Q "Deposited the next day." (R. 142)

Q "That is correct." (R. 142)

Q "Yes, that is correct." (R. 142)

Q "I did not." (R. 142)

Q "41,000 some odd dollars." (R. 103)

Q "He told me that if I would hold the check until Saturday and deposit it, that it would be paid, that he had used a part of the money that he received from Simon & Brown to pay for the cattle that he was shipping on Monday and Tuesday of that week before he came up here Wednesday and he would have the money back and pay the check that was deposited on Saturday." (R. 103, 104)

Q "I did hold it until Saturday." (R. 104)

Q "That is correct." (R. 104)

Q "Yes, sir." (R. 104)

Q "The following week." (R. 104)

Q "Well, I would say it would be from Tuesday to Thursday, some place in the week there, the middle of the week." (R. 104)

Q "Oh, some time from the 24th to the 27th, I would think. I could look at a calendar and tell approximately." (R. 104)

Q "We returned it for collection at the suggestion of the bank." (R. 105)

Q "Early in August." (R. 105)

Q "I did not before the 6th of August because I had to go to Albuquerque to attend a meeting on the East and South. I was on the 6th and 9th I think it was. I had planned to be in Phoenix, but it was necessary for me to go there." (R. 105)

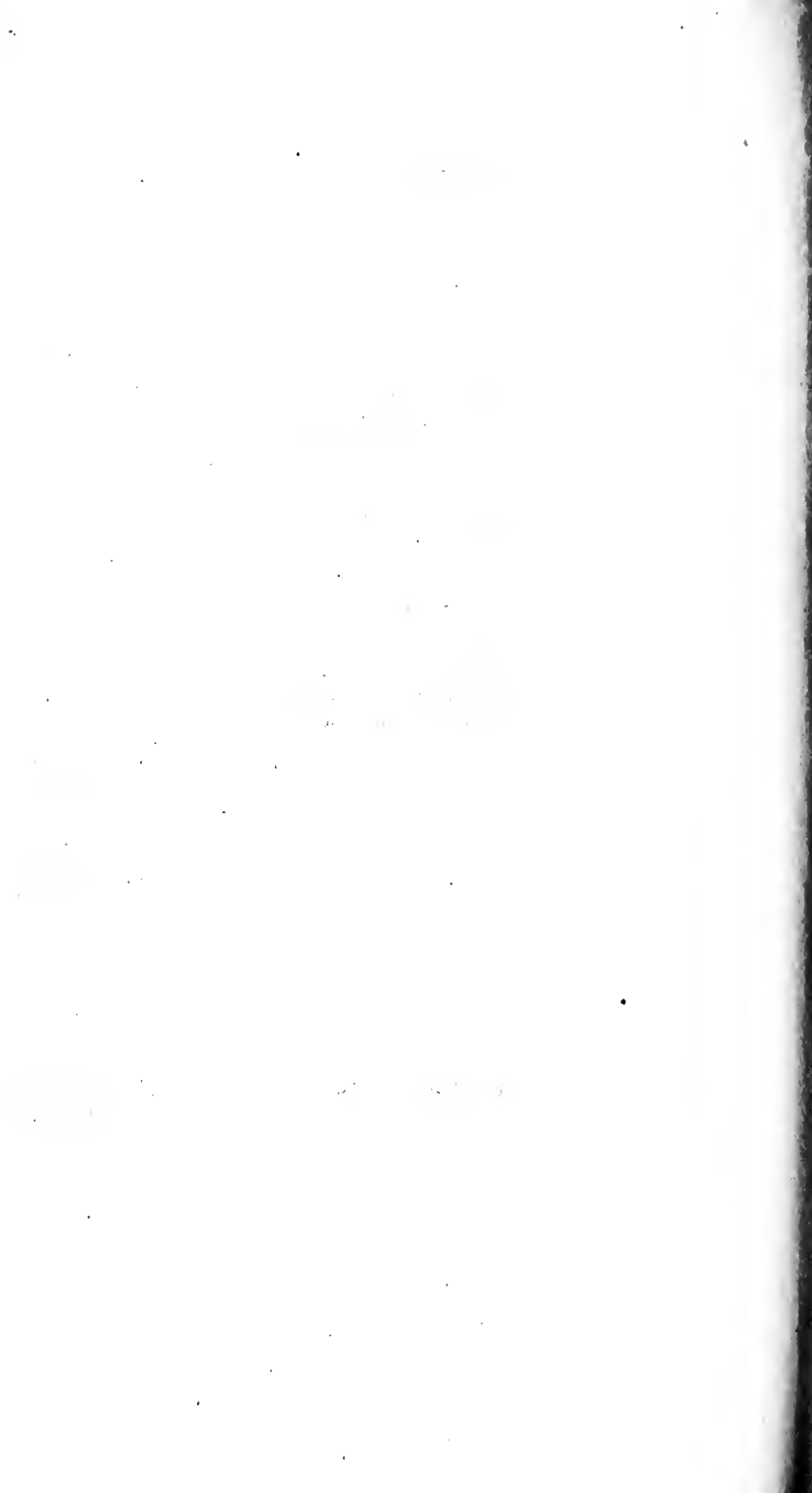
Q "I did August on the 9th." (R. 105)

Q "I did August as soon as I returned to Phoenix." (R. 105)

Q "No." (R. 105)

FOLD C

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No. 12,679

IN THE

United States

Court of Appeals

For the Ninth Circuit

HOWARD BROWN, individually and as surviving partner of the copartnership of Sinton & Brown, Dean Brown and Howard S. Brown, Florence R. Sinton and Silas D. Sinton, Jr., as Executors of the Estate of Silas D. Sinton, deceased, as members of and constituting the partnership known as Sinton & Brown,

Appellants-Defendants,

vs.

COWDEN LIVESTOCK CO., a corporation,
Appellee-Plaintiff

APPELLEE'S PETITION FOR REHEARING

SNELL & WILMER

MARK WILMER

JAMES A. WALSH

703 Heard Building
Phoenix, Arizona

Attorneys for Appellee-Plaintiff

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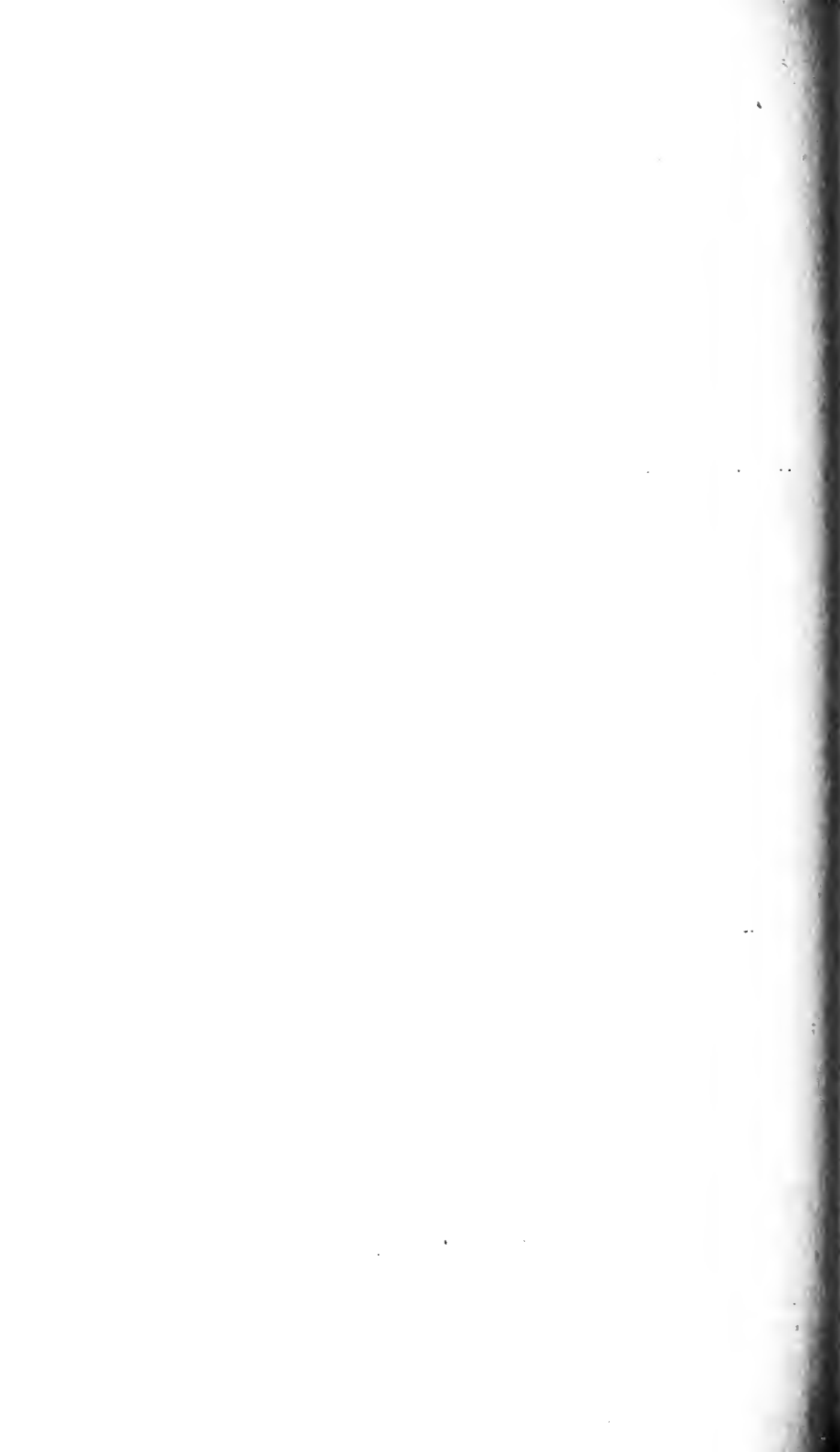


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IN THE

United States
Court of Appeals
For the Ninth Circuit

HOWARD BROWN, individually and as surviving partner of the copartnership of Sinton & Brown, Dean Brown and Howard S. Brown, Florence R. Sinton and Silas D. Sinton, Jr., as Executors of the Estate of Silas D. Sinton, deceased, as members of and constituting the partnership known as Sinton & Brown,

Appellants-Defendants,

vs.

COWDEN LIVESTOCK CO., a corporation,

Appellee-Plaintiff

APPELLEE'S PETITION FOR REHEARING

To the Honorable United States Court of Appeals for the Ninth Circuit and the Judges thereof:

Comes now Cowden Livestock Co., the appellee herein, and presents this, its petition for a rehearing of the above-entitled cause, and in support thereof, respectfully shows:

I

The premise upon which the decision of this Court reversing the judgment below is based, i.e., that the creation of the relationship of creditor and debtor between appellee and Adams *ipso facto* released appellant from the obligation of payment of its debt to appellee, is erroneous and unsound.

In the absence of an agreement that the old obligation should be extinguished and a new one substituted, a novation will not be implied from the mere acceptance by the creditor of the obligation of a third person. If no more appears than that the creditor has taken the negotiable instrument of a third person who has assumed the debt, that fact does not operate as a novation releasing the old debtor, but such new obligation will be considered only as a conditional payment or a collateral security.

66 C.J.S., Sec. 18(e), pp 703, 704;

L.R.A. 1918B, p. 113 et seq.;

City National Bank of Huron v. Fuller, 52 F. 2d 870, 875 (C.C.A. 8, 1931);

Kirkman v. Farmers Savings Bank, 28 F. 2d 857, 861, 862 (C.C.A. 8, 1928);

Illinois Car & Equipment Co. v. Linstroth, 112 F. 737, 740-741 (C.C.A. 7, 1902);

Harrington-Wiard Co. v. Blomstrom Mfg. Co., 166 Mich. 276, 131 N.W. 559, 563 (1911);

Albert Steinfeld & Co. v. Wing Wong, 14 Ariz. 336, 339, 340, 128 P. 354, 356 (1912);

Denman v. Bruce-Rogers Co., 190 Ark. 1098, 82 S.W. 844, 846 (1935).

In the case at bar, there is no evidence whatever in the record that appellee ever agreed to release the obligation of appellant or to substitute Adams in the place of appellant. To the contrary, the evidence is undisputed, and the court below found, that ap-

pellee received Adams' check conditionally upon its being paid when presented (R. 36, 97, 98).

II

The holding of the Court to the effect that appellee by its dealings with Adams on July 16th ratified Adams' conduct in receiving collections from appellant, is at variance with the rule established by practically all of the courts of the United States—including this Court—that ratification of the unauthorized act of an agent is not possible unless at the time he was doing the act the agent purported to be acting for and on behalf of his principal.

Although it is stated at one point in the opinion in this case (p. 5, last paragraph), that a decision upon the question of ratification is unnecessary, the Court has in fact decided (p. 6) that appellee could and did ratify or "retroactively give its consent" to Adams' unauthorized acts in making collections from appellant. Obviously, consent retroactively given is but another way of expressing the term "ratification", since the substance of the doctrine of ratification is the idea of confirmation after conduct.

Thus, although it is beyond dispute that Adams never purported to appellant to be other than the sole owner of appellee's cattle at the time he received the collections from appellant, we have here a decision by the Court that appellee could and did, by its conduct on July 16th, ratify the acts of Adams in making the collections. The unsoundness of such a holding is, we feel, amply demonstrated by our argument under Proposition IV of our Appellee's Brief (pp. 11-14), but we desire to supplement the same with the following citations:

124 *A.L.R.* p. 893 et seq.;

Pullen v. Dale, 109 F. 2d 538, 539 (C.C.A. 9, 1940).

Wherefore, upon the foregoing grounds, it is respectfully urged that the petition for a rehearing be granted, and that the judgment of the District Court be upon further consideration affirmed.

Respectfully submitted,

SNELL & WILMER

JAMES A. WALSH

MARK WILMER

Attorneys for Appellee-Plaintiff

CERTIFICATE OF COUNSEL

I, James A. Walsh, counsel for the above named Cowden Livestock Co., appellee, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

JAMES A. WALSH

Counsel for Cowden Livestock Co.,
Appellee.

No. 12680

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.

A. LESTER MARKS, ELIZABETH LOY
MARKS, and HERBERT M. RICHARDS,
Trustees of the Estate of L. L. McCANDLESS,
Deceased,
Appellees.

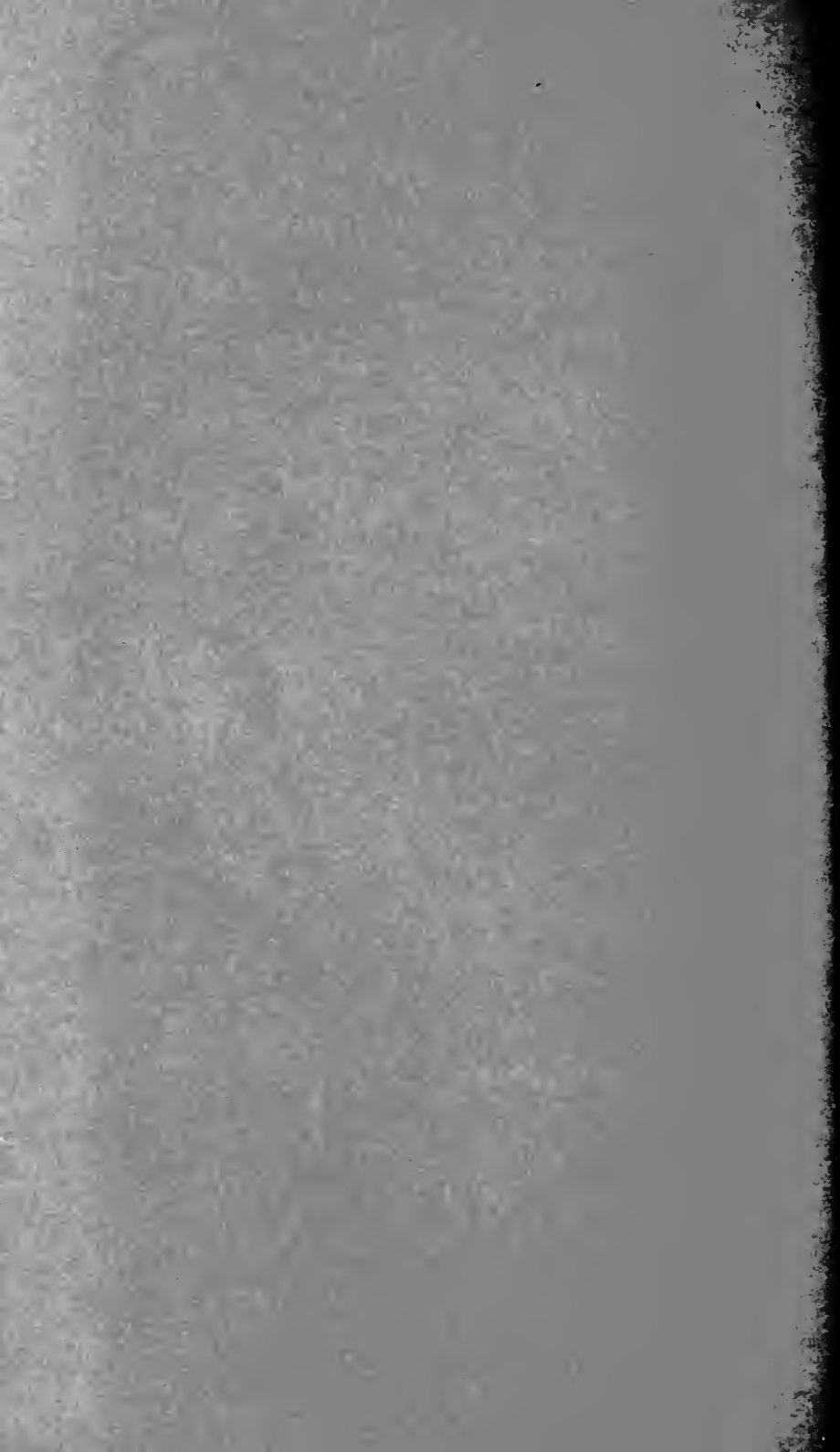
Transcript of Record

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Appeal from the United States District Court,
for the Territory of Hawaii.

SAUL P. O'BRIEN,
CLERK



No. 12680

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.

A. LESTER MARKS, ELIZABETH LOY
MARKS, and HERBERT M. RICHARDS,
Trustees of the Estate of L. L. McCANDLESS,
Deceased,
Appellees.

Transcript of Record

Appeal from the United States District Court,
for the Territory of Hawaii.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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**NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD**

For the Plaintiffs, A. Lester Marks, Elizabeth Loy Marks, and Herbert M. Richards, Trustees of the Estate of L. L. McCandless, deceased:

ROBERTSON, CASTLE & ANTHONY,

312 Castle & Cooke Bldg.,
Honolulu 1, Hawaii.

For the Defendant, United States of America:

FRED K. DEUEL, ESQ.,

Special Attorney, Department of Justice,
Federal Building,
Honolulu, T. H.

In the District Court of the United States
For the Territory of Hawaii

Civil No. 886

A. LESTER MARKS and BISHOP TRUST
COMPANY, LIMITED, Executor, Administra-
tor, C.T.A. and Trustees of the Estate of L. L.
McCandless, Deceased,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Come now A. Lester Marks, Executor and
Trustee, and Bishop Trust Company, Limited,
Administrator-with-the-Will-Annexed and Trustee,
of the Estate of L. L. McCandless, deceased, plain-
tiffs above named, and complaining of the defend-
ant above named, for cause of action, allege as
follows:

1.

Jurisdiction of this court is founded on Private
Law 433—80th Congress, Second Session, approved
June 30, 1948, a copy of which is hereto attached
and marked "Exhibit A."

2.

On December 7, 1941, plaintiffs were the owners
of a ranch at Makua and Waianae, Oahu, Territory
of Hawaii, and that on said day and immediately
subsequently, the Armed Forces of the United

States entered upon said ranch, took possession of the premises and destroyed fences, paddocks and corrals causing the livestock on the ranch to disperse and scatter over the countryside resulting in a loss of personal property of plaintiffs in the sum of \$46,155.00.

3.

Plaintiffs on December 7, 1941, were the holders of two leases, being General Leases Nos. 1740 and 1741, from the Commissioner of Public Lands of the Territory of Hawaii, demising lands in Waianae and Waialua districts, Island of Oahu, Territory of Hawaii, aggregating 4792.72 acres in area for terms of 21 years from December 29, 1925. On July 2, 1942, plaintiffs were notified by the Commissioner of Public Lands that upon the request of Lt. General Delos C. Emmons, the land covered by General Lease No. 1740 "is hereby cancelled, effective June 29, 1942," and by a similar letter dated July 28, 1942, the Commissioner of Public Lands notified the plaintiffs that General Lease No. 1741 "is hereby cancelled, effective December 29, 1942"; that the defendant occupied the lands covered by the leases for the remainder of their terms which expired December 29, 1946; that the purported cancellation was without any right given under the provisions of said leases and was without right or authority conferred on the Commissioner of Public Lands under the laws of the United States or the Territory of Hawaii and was to the damage of plaintiffs in the sum of \$67,500.00.

Wherefore, plaintiffs demand judgment in the total sum of \$113,615.00.

Dated: Honolulu, Hawaii, December 13, 1948.

/s/ J. GARNER ANTHONY,
Attorney for Plaintiffs.

ROBERTSON, CASTLE &
ANTHONY,
Of Counsel.

Exhibit A

(Private Law 433—80th Congress)
(Chapter 747—2d Session)
(H. R. 915)

An Act

To confer jurisdiction upon the District Court of the United States for the Territory of Hawaii to hear, determine, and render judgment on the claims of the executors and trustees of the estate of L. L. McCandless, deceased, as their interests may appear against the United States of America.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the District Court of the United States for the Territory of Hawaii to hear, determine, and render judgment upon the claims of the executors and trustees of the estate of L. L. McCandless, deceased, as their interests may appear, against the United States of America for damages, if any, but not exceeding the sum of \$46,155, for the loss of

personal property including the loss of livestock, alleged to have been caused by military personnel of the United States, and for damages, if any, but not exceeding the sum of \$67,500 for the alleged illegal withdrawal of the Government lands covered by General Leases Numbers 1740 and 1741 of the Territory of Hawaii, each dated December 29, 1925, from the operation of those leases for use by the United States Army for war purposes: Provided, That judgment shall not be rendered against the United States with respect to any part of the alleged damages for the loss of personal property, including livestock, which arose out of the combat activities of military personnel of the United States.

Sec. 2. Proceedings for the determination of these claims shall be had in the same manner as in cases against the United States of which the district courts of the United States have jurisdiction under the provisions of section 24 of the Judicial Code, as amended: Provided, that suit hereunder shall be instituted within one year after the enactment of this Act: And provided further, That this Act shall be construed only to waive the immunity from suit of the Government of the United States and to confer jurisdiction upon said court to hear, determine, and render judgment upon the claims of the executors and trustees of the estate of L. L. McCandless, deceased, described in section 1 hereof, and not otherwise to affect any substantive rights of the parties.

Approved June 29, 1948.

[Endorsed]: Filed December 14, 1948.

[Title of District Court and Cause.]

SUMMONS

To the United States of America, Defendant:

You are hereby summoned and required to serve upon J. Garner Anthony of Roberston, Castle & Anthony, 312 Castle & Cooke Building, Honolulu, Hawaii, an answer to the Complaint which is herewith served upon you within sixty (60) days after service of this Summons upon you, exclusive of the day of service.

If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

Dated: Honolulu, Hawaii, December 14th, 1948.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk of Court.

(This Summon is issued pursuant to Rule 4,
of the Federal Rules of Civil Procedure).

Receipt of Copy attached.

Marshal's Return attached.

[Title of District Court and Cause.]

ANSWER

The defendant, by W. Braxton Miller, Special Assistant to the Attorney General of the United States, and acting under his instructions, for its answer says:

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

The complaint fails to state a claim within the jurisdiction conferred upon this Court by Private Law 433, 80th Cong., 2d Sess., approved June 30, 1948.

Third Defense

1. The defendant is without information sufficient to form a belief with respect to the allegation in paragraph 2 that the plaintiffs on December 7, 1941, were the owners of a ranch at Makua and Waianae, Oahu, Territory of Hawaii. The defendant denies the remaining allegations in paragraph 2 of the complaint.

2. The defendant is without information sufficient to form a belief with respect to the truth or falsity of the allegations of ownership and cancellation of leases Nos. 1740 and 1741 that it occupied the lands covered by the leases for the period of time alleged. The defendant denies that the cancella-

tion was unauthorized and invalid. The defendant denies that plaintiffs have been damaged as alleged in paragraph 3 of the complaint.

Wherefore defendant demands that the complaint be dismissed and that it be awarded its costs.

/s/ W. BRAXTON MILLER,
Special Assistant to,
The Attorney General.

Service accepted this 17th day of January, 1949.

/s/ J. GARNER ANTHONY,
Attorney for Plaintiffs.

[Endorsed]: Filed January 17, 1949.

[Title of District Court and Cause.]

FIRST AMENDED ANSWER

The defendant, by Fred K. Deuel, Special Attorney, Department of Justice, hereby amends its answer to read as follows:

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

The complaint fails to state a claim within the jurisdiction conferred upon this Court by Private Law 433, 80th Cong., 2d Sess., approved June 30, 1948.

Third Defense

1. The defendant is without information sufficient to form a belief with respect to the allegation in paragraph 2 that the plaintiffs on December 7, 1941, were the owners of a ranch at Makua and Waianae, Oahu, Territory of Hawaii. The defendant denies the remaining allegations in paragraph 2 of the complaint.

2. The defendant is without information sufficient to form a belief with respect to the truth or falsity of the allegations of ownership and cancellation of leases Nos. 1740 and 1741 that it occupied the lands covered by the leases for the period of time alleged. The defendant denies that the cancellation was unauthorized and invalid. The defendant denies that plaintiffs have been damaged as alleged in paragraph 3 of the complaint.

Fourth Defense and Claim of Setoff

Following the termination of the leases referred to in the complaint the defendant expended the sum of \$23,868.52 in the construction of buildings and facilities on other lands owned by the plaintiffs. These expenditures were made in connection with removal of the plaintiffs' ranch activities from the leased property to said other lands. Should damages be awarded based upon termination of the leases, the defendant prays that it be allowed the aforesaid sum of \$23,868.52, as a setoff.

Fifth Defense

The Plaintiff acquiesced in the cancellation of leases Nos. 1740 and 1741 and in the occupancy by the defendant of the land covered by said leases.

Wherefore defendant demands that the complaint be dismissed and that it be awarded its costs.

/s/ FRED K. DEUEL,
Special Attorney,
Department of Justice.

Consent is hereby given to the foregoing amendment and service is accepted this 13th day of January, 1950.

/s/ J. GARNER ANTHONY,
Attorney for Plaintiffs.

[Endorsed]: Filed January 13, 1950.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the defendant, United States of America, by Fred K. Deuel, Special Attorney, Department of Justice, and now at the conclusion of all the evidence, hereby moves the Court for an order dismissing that portion of the plaintiff's complaint set forth in Paragraph 3 thereof on the ground that on the facts and the law, the plaintiff has shown no right to relief and more specifically on the following grounds:

1. Private Law 433-80th Congress, under which the action is brought, does not encompass a suit for or recovery for use and occupancy.

2. There is no cause of action stated in said Paragraph 3 as against the defendant, United States of America.

3. General Leases Nos. 1740 and 1741 mentioned in said Paragraph 3, were in fact validly cancelled by action of the Commissioner of Public Lands for the Territory of Hawaii.

4. No compensable interest exists in favor of the plaintiff as against the United States of America for the use and occupancy of the lands covered by General Leases Nos. 1740 and 1741.

5. The plaintiff in fact acquiesced in the cancellation of General Leases Nos. 1740 and 1741.

Respectfully submitted,

UNITED STATES OF
AMERICA,
Defendant.

By /s/ FRED K. DEUEL,
Special Attorney,
Department of Justice.

[Endorsed]: Filed April 3, 1950.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Come now A. Lester Marks, Elizabeth Loy Marks and Herbert M. Richards, Trustees of the Estate of L. L. McCandless, deceased, plaintiffs above named, and complaining of the defendant above named, for cause of action, allege as follows:

1.

Jurisdiction of this Court is founded on Private Law 433, 80th Congress, Second Session, approved June 30, 1948, a copy of which is attached to the original complaint and incorporated herein by reference.

2.

On December 7, 1941, the Estate of L. L. McCandless, deceased, was the owner of a ranch at Makua and Waianae, Oahu, Territory of Hawaii, and that on said day and immediately subsequently, the Armed Forces of the United States entered upon said ranch, took possession of the premises and destroyed fences, paddocks and corrals causing the livestock on the ranch to disperse and scatter over the countryside resulting in a loss of personal property of plaintiffs in the sum of \$46,-155.00; that plaintiffs are the duly appointed, qualified and acting Trustees of the Estate of L. L. McCandless, deceased.

3. .

That said Estate on December 7, 1941, held two leases, being General Leases Nos. 1740 and 1741,

from the Commissioner of Public Lands of the Territory of Hawaii, demising lands in Waianae and Waialua districts, Island of Oahu, Territory of Hawaii, aggregating 4792.72 acres in area for terms of 21 years from December 29, 1925. On July 2, 1942, said Estate was notified by the Commissioner of Public Lands that upon the request of Lt. General Delos C. Emmons, the land covered by General Lease No. 1740 "is hereby cancelled, effective June 29, 1942," and by a similar letter dated July 28, 1942, the Commissioner of Public Lands notified said Estate that General Lease No. 1741 "is hereby cancelled, effective December 29, 1942"; that the defendant occupied the lands covered by the leases for the remainder of their terms which expired December 29, 1946; that the purported cancellation was without any right given under the provisions of said leases and was without right or authority conferred on the Commissioner of Public Lands under the laws of the United States or the Territory of Hawaii and was to the damage of plaintiffs in the sum of \$67,500.00, for the taking of said leasehold and the use and occupation of said lands.

Wherefore, plaintiffs demand judgment in the total sum of \$113,615.00.

Dated: Honolulu, Hawaii, April 12, 1950.

/s/ J. GARNER ANTHONY,
Attorney for Plaintiffs.

ROBERTSON, CASTLE &
ANTHONY,
Of Counsel.

Receipt of Copy Acknowledged.

[Endorsed]: Filed April 12, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

This cause having come on for hearing, jury waived, pursuant to Private Law 443, Ch. 747, 2d Sess., 80th Cong., and the Court having heard the evidence, finds the facts and states the conclusions of law as follows:

Findings of Fact

1.

That A. Lester Marks, Elizabeth Loy Marks and Herbert M. Richards are the duly appointed, qualified and acting trustees of the Estate of L. L. McCandless, deceased, and are as such trustees the owners and holders of the claim of said estate against defendant hereafter referred to.

2.

That on December 7, 1941, the Estate of L. L. McCandless, deceased, was the owner of a cattle ranch at Makua and Waianae on the island of Oahu, Territory of Hawaii.

3.

That included in said ranch were two tracts of land under General Leases 1740 and 1741, from the Commissioner of Public Lands of the Territory of Hawaii, containing an area of 4,783.88 acres, said leases were for a term of 21 years beginning December 29, 1925.

4.

That on December 7, 1941, military personnel of the defendant entered into possession of plaintiffs' ranch and thereafter occupied the entire premises, disrupting plaintiffs' ranching operations; that upon the initial entry only a small number of troops occupied portions of the ranch premises along the coastline, but subsequently in the year 1942, a substantial number of military personnel was deployed throughout the premises together with their equipment; that the military personnel so entering upon the plaintiffs premises were not engaged in combat activities.

5.

That as a direct result of the activities of the military personnel on the premises, fences, paddocks and corrals were destroyed and caused livestock of plaintiffs to be dispersed throughout the country-

side which resulted in damage to the plaintiffs as follows:

(a)	287 head of cattle lost.....	\$12,915.00
(b)	Cost to plaintiffs of recovering stray cattle	2,079.00
(c)	200 pigs	3,000.00
(d)	2 horses	250.00
(e)	Loss of 500 bags, 400 bags of algaroba beans and 200 redwood posts	190.00
(f)	Value of General Leases 1740 and 1741 for $4\frac{1}{3}$ years	41,460.29
(g)	Rental value of house and guest cottage	6,000.00
Total		\$65,894.29

6.

That the injuries and damages and loss of personal property and loss of said leaseholds did not arise out of the combat activities of the military personnel of the United States.

7.

That the construction by the United States of certain improvements on land owned in fee simple by the Estate of L. L. McCandless was made without reference to the claim, the subject matter of this action, and is irrelevant to plaintiffs' recovery herein and that defendant has failed to establish said set-off by a preponderance of the evidence and it is therefore denied.

8.

That plaintiffs did not acquiesce in the cancellation of General Leases 1740 and 1741, but were obliged to and did in fact peacefully surrender possession and occupancy of the land thereby demised to defendant without surrendering their right to receive just compensation for said taking.

Conclusions of Law

1.

That this Court has jurisdiction of the claim pursuant to Private Law 433, 80th Congress, 2d Session, approved June 29, 1948.

2.

That the occupancy and possession of the lands described in General Leases No. 1740 and 1741 was without lawful authority and that the action of the Commissioner of Public Lands purporting to withdraw said leases for the use of military personnel did not constitute a withdrawal for public purposes of the Territory of Hawaii as provided in the Hawaiian Organic Act and the leases referred to and that plaintiffs are entitled to just compensation for the taking of said leaseholds.

3.

The Court having found that plaintiffs have established the allegations of the amended complaint by a preponderance of the evidence and having further found that defendant failed to establish its set-off that therefore judgment should be en-

tered in favor of plaintiffs and against defendant in the sum of \$65,894.29.

Dated: Honolulu, Hawaii, April 18th, 1950.

/s/ D. E. METZGER,
District Judge.

[Endorsed]: Filed April 19, 1950.

In the District Court of the United States
For the Territory of Hawaii

Civil No. 886

A. LESTER MARKS, ELIZABETH LOY
MARKS and HERBERT M. RICHARDS,
Trustees of the Estate of L. L. McCandless,
Deceased,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This cause came on to be heard before the Court, sitting without a jury, and the Court having entered findings of fact and conclusions of law,

It Is Hereby Ordered, Adjudged and Decreed that plaintiffs recover of defendant, the sum of \$65,894.29, together with interest thereon at the rate of 6% per annum from the date hereof until paid.

Dated: Honolulu, Hawaii, April 19th, 1950.

By the Court:

/s/ WM. F. THOMPSON, JR.,
Clerk.

Docketed April 19, 1950.

[Endorsed]: Filed April 19, 1950.

In the District Court of the United States
For the Territory of Hawaii
Civil No. 886

A. LESTER MARKS, ELIZABETH LOY
MARKS and HERBERT M. RICHARDS,
Trustees of the Estate of L. L. McCandless,
Deceased,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

AMENDED JUDGMENT

This cause came on to be heard before the Court, sitting without a jury, and the Court having entered findings of fact and conclusions of law,

It Is Hereby Ordered, Adjudged and Decreed that plaintiffs recover of defendant, the sum of \$65,-894.29, together with interest thereon as provided by law.

Dated: Honolulu, Hawaii, April 25th, 1950.

By the Court:

/s/ WM. F. THOMPSON, JR.,
Clerk.

[Endorsed]: Filed April 25, 1950.

Docketed April 25, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, defendant herein, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the entire final Judgment entered as to the above cause on April 19, 1950, as said Judgment was amended by Amended Judgment entered on April 25, 1950.

Dated: Honolulu, T. H., this 16th day of June, 1950.

UNITED STATES OF
AMERICA,

By /s/ FRED K. DEUEL,
Special Attorney,
Department of Justice.

[Endorsed]: Filed June 16, 1950.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET
RECORD ON APPEAL

For good cause shown and in the discretion of
the Court,

It Is Hereby Ordered that Petitioner, United
States of America, shall have ninety (90) days from
June 16, 1950, the date of Notice of Appeal, to
file the record on appeal in the above-entitled case
and to docket the same in the United States Circuit
Court of Appeals for the Ninth Circuit.

Dated: Honolulu, T. H., this 18th day of July,
1950.

/s/ D. E. METZGER,

Judge of the United States District Court for the
District of Hawaii.

[Endorsed]: Filed July 18, 1950.

[Title of District Court and Cause.]

DESIGNATION OF THE CONTENTS
OF THE RECORD ON APPEAL

The United States of America, appellant in the
above-entitled cause, designates for inclusion in
the record on appeal the following:

1. The complete record and all the proceedings
and evidence in the action.

2. This designation of the contents of the record on appeal.

UNITED STATES OF
AMERICA,
Appellant.

By /s/ FRED K. DEUEL,
Special Attorney,
Department of Justice.

[Endorsed]: Filed August 23, 1950.

[Title of District Court and Cause.]

AMENDED DESIGNATION OF THE
CONTENTS OF THE RECORD ON
APPEAL

The United States of America, appellant in the above-entitled cause, designates for inclusion in the record on appeal the following:

1. The complete record and all the proceedings and evidence in the action.

2. The stipulation and order thereon in Civil Action No. 485 filed and entered in the above-designated Court on July 1, 1949, being the settlement referred to at page 90 of the transcript of proceedings of the above-designated case and of which the Court took judicial notice. A certified copy of said stipulation and order is attached hereto.

3. This designation of the contents of the record on appeal.

UNITED STATES OF
AMERICA,
Appellant.

By /s/ FRED K. DEUEL,
Special Attorney,
Department of Justice.

Receipt of a copy of the foregoing designation is hereby acknowledged this 8th day of September, 1950, and objects to the inclusion of the stipulation in Civil 485 as not a proper part of the record on appeal in the above cause.

/s/ J. GARNER ANTHONY,
Counsel for Appellee.

In the District Court of the United States for the
District of Hawaii, April Term, 1949

Civil No. 485

UNITED STATES OF AMERICA,

Petitioner,

vs.

165.847 Acres of land, more or less, situate in
Waianae, Oahu, Territory of Hawaii, Oahu
Railway and Land Company, a corporation;
et al.,

Defendants.

STIPULATION

It Is Hereby Stipulated by and between petitioner, United States of America, and the defendants, A. Lester Marks, Executor under the last Will and Testament of L. L. McCandless, deceased, Bishop Trust Company, Ltd., Administrator with the Will annexed of the Estate of L. L. McCandless, deceased, A. Lester Marks, Elizabeth Loy Marks and Elizabeth Janet Cartwright McCandless, Trustees under the Will and of the Estate of L. L. McCandless, deceased, all acting by and through Robertson, Castle and Anthony, their attorneys of record, as follows:

(1) That the fair market value and just compensation which should be paid for the taking of the full, free and unencumbered fee simple title to Parcels 2, 3, 4, 5, 6, 7, 11, 12, 13, 14, 15, 16, 18 and 19, as described in the petition of condemnation as

amended and declaration of taking as amended filed herein, is the sum of \$65,000.00, and which sum includes any interest due or that may become due on the difference between the deposits made on account of just compensation for said parcels at the time of the filing of said declaration of taking and the amount herein agreed upon as the total just compensation for the taking of said parcels of land, except as hereinafter provided.

(2) That petitioners shall within 60 days after the entry of an order fixing said just compensation as herein agreed upon, deposit or cause to be deposited in the registry of this court the difference between the agreed just compensation and the deposits made on account of the just compensation for the taking of said parcels at the date of the filing of said declaration of taking, and in the event that said petitioners shall fail to deposit said deficiency within said 60-day period then petitioner shall also pay interest at the rate of 6% on said deficiency from the end of said 60-day period and until such deposit is made.

(3) It is further understood and agreed that out of said agreed just compensation there shall be paid any claims, judgments, liens or encumbrances existing against such parcels of said land at the time of the taking by the Government on March 23, 1943, and there shall be paid out of said sum of \$65,000.00 to Clement Paiaina and Sybil Davis as Statutory Administratrix of the Estate of Rachael Paiaina Poe, deceased, the fair value and just compensa-

tion which may be determined to represent the value of their interests in and to Parcel 6 at the time of the taking herein; and to Dorothy K. Otholt Passos, the fair value and just compensation which may be determined to be due her for her interest in Parcel 2 at the time of the taking herein.

(4) It is understood and agreed that said sum of \$65,000.00 represents the total just compensation required to be paid for all interest in and to said parcels hereinbefore identified.

(5) It is further agreed that at the time of the filing of the declaration of taking herein there was deposited on account of just compensation or as the estimated just compensation for the taking of said parcels hereinbefore identified, the sum of \$18,178.00, and that the sum of \$46,822.00 represents the deficiency between said total of deposits and the agreed just compensation of \$65,000.00.

(6) It is stipulated and agreed that an order and judgment may be made and entered hereon and conforming to the terms of said stipulation.

Dated: Honolulu, T. H., this 30th day of June, 1949.

THE UNITED STATES OF
AMERICA,

By /s/ HARRY T. DOLAN,
Special Assistant to the
Attorney General.

ROBERTSON, CASTLE &
ANTHONY,

Attorneys for the
Defendants Named Herein.

By /s/ J. GARNER ANTHONY.

So Ordered this 30th day of June, 1949.

/s/ J. FRANK McLAUGHLIN,
Judge of the United States District Court for the
District of Hawaii.

A True Copy.

Filed July 1, 1949.

[Endorsed]: Filed September 8, 1950.

In the District Court of the United States
for the Territory of Hawaii

Civil No. 886

A. LESTER MARKS, ELIZABETH LOY
MARKS and HERBERT M. RICHARDS,
Trustees of the Estate of L. L. McCandless,
Deceased,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

TRANSCRIPT OF PROCEEDINGS

February 14, 15, 16 and 17, 1950

Before: Hon. Delbert E. Metzger,
Judge.

Appearances:

J. GARNER ANTHONY, Esq.,
312 Castle & Cooke Building, Honolulu,
T. H., Appearing on Behalf of the Plaintiff.

FRED K. DEUEL, Esq.,
Special Attorney, Department of Justice,
Appearing on Behalf of the Defendant.

The Clerk: Civil No. 886, A. Lester Marks and
Bishop Trust Company, Limited, Executor, Admin-
istrator and Trustee of the Estate of L. L. McCand-
less, Deceased, Plaintiffs, vs. United States of
America, for trial.

The Court: Who leads?

Mr. Anthony: We have the burden of proof, your Honor. I would like to make a brief statement, if that would be desired by the Court.

The Court: Yes.

Mr. Anthony: This case, if the Court please, is an action brought under a private law, Act of Congress, which confers jurisdiction upon this Court to hear, jury waived, the claim of the Estate of L. L. McCandless against the United States for the damage and destruction of certain property in the Waianae District located at the McCandless Ranch, and for the unlawful possession, cancellation, and termination of the lease which the Estate had from the Territory of Hawaii on the premises. The statute itself, under which we are proceeding, confers jurisdiction upon this Court "to hear, determine, and render judgment upon the claims of the executors and trustees of the estate of L. L. McCandless, deceased, as their interests may appear, against the United States of America for damages, if any, but not exceeding the sum of \$46,155, for the loss of personal property including the loss of livestock, alleged to have been caused by military personnel of the United States, and for damages, if any, but not exceeding the sum of \$67,500 for the alleged illegal withdrawal of the Government lands covered by General Leases Numbers 1740 and 1741 of the Territory of Hawaii, each dated December 29, 1925, from the operation of those leases for use by the United States Army for war purposes: Provided,

That judgment shall not be rendered against the United States with respect to any part of the alleged damages for the loss of personal property, including livestock, which arose out of the combat activities of military personnel of the United States.”

The claim, as I have stated, is in two parts. The first relates to the personal property and the second part of the claim relates to the unlawful withdrawal by the Territory of the leases 1740——

The Court: Was that an unlawful withdrawal?

Mr. Anthony: Oh, yes, your Honor. That is a question of law which we will argue at the conclusion of the case or at such time as your Honor may designate. The situation as to that, in brief, is this: The two leases in question were executed in 1925 and contained a right of withdrawal reserved to the Territory for public purposes and for sale in the event the Territory wanted to sell them. The [2*] public purposes as stated in the lease and as that language was used in the Organic Act at the time the leases were executed, were public purposes of the Territory of Hawaii. Thereafter, in August of 1941, the Organic Act was amended to include a withdrawal for purposes of the United States. It is our contention, as a matter of law, that this was not a retroactive provision. In other words, you could not thus impair the obligation of the lease. All that amendment meant was that from and after the date of the amendment any lease would be subject to withdrawal for purposes, not only public

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

purposes of the Territory, but public purposes of the United States. We have authorities to support the proposition that in such an instance the statute is not retroactive in its operation. This case is not the same as the case that was before the Court in *United States vs. Chun Chin*.

The Court: I recollect.

Mr. Anthony: Your Honor tried a proceeding in which the United States sought to condemn certain parcels of land, some of which were owned by the Territory. Thereafter the United States endeavored to discontinue and to procure by executive order the land in question, and the judgment of the Court of Appeals was that the United States had the right to proceed in that administrative way to vest the title in the United States. However, the Court of Appeals was very careful to point out in that case that the possession of the [3] lessee was not disturbed by the United States, and I believe they stated, if that had been the fact, then, of course, there would be an appropriate action for compensation.

The statute in this case, Private Law No. 433 of the 80th Congress, Second Session, expressly confers jurisdiction upon this Court to hear and pass on, not only the question of the damages to the personal property, but on the question of the invalidity of that alleged cancelation, which we contend is of no force and effect and is void. We are ready to proceed, your Honor, with our witnesses.

The Court: Do you want to make any statement?

Mr. Deuel: I have no particular opening statement at the moment, your Honor, except that the Government disagrees with Counsel in regard to whether or not the amendment that he spoke of to the Organic Act in 1941 was pertinent to this issue. I believe there should be a determination regarding this question as to the cancelation of these leases, if possible, at an early stage of the case, for the reason that if your Honor should rule with the Government on that it will avoid the necessity of calling and putting on witnesses with regard to these leases and evaluation and cut out considerable time in trial. By agreement with Counsel we have some joint exhibits to go in, and at that point I would like to make a motion that your Honor determine that question.

Mr. Anthony: So far as time is concerned, we will [4] probably be finished today, your Honor, certainly not later than tomorrow noon. It is a very short matter.

The Court: Your case will cover that?

Mr. Anthony: Yes, I mean including that. I would say in a day and a half we would certainly finish.

The Court: Then you can attack that, I think, following. I don't know that anything would be gained by just dealing with that feature as a first thing. I am willing to hear Counsel on that point.

Mr. Anthony: We have some exhibits, your Honor.

The Court: It seems to me if you think you can get through today it would be better for you to proceed in your own fashion.

Mr. Anthony: At this time we would like to offer in evidence an exhibit which has been agreed upon between Counsel, being a geographical survey map of a portion of the Waianae District, which has indicated in blue pencil the areas covered by Lease No. 1741 and 1740.

The Court: No objection?

Mr. Deuel: These are joint exhibits right now which have been agreed upon, your Honor.

The Court: Received in evidence.

The Clerk: Joint Exhibit A.

(Thereupon, the document above referred to was received in evidence as Joint Exhibit A.) [5]

Mr. Anthony: We have a second joint exhibit, your Honor, which consists of the following: General Lease No. 1740, dated December 29, 1925.

The Court: 29 or 9?

Mr. Anthony: December 29, 1925, for a term of 21 years. As a part of that same exhibit, Assignment of Lease, dated March 21, 1928, from the original lessor, James F. Woods to L. L. McCandless; and a third document being a letter dated July 2, 1942.

The Court: All in one exhibit?

Mr. Anthony: Yes, they are all germane to the same lease, your Honor.

The Court: Yes.

Mr. Anthony: July 2, 1942, from L. M. Whitehouse, Commissioner of Public Lands, to Bishop Trust Company, Ltd., and Lester A. Marks, Trus-

tees of the Estate of L. L. McCandless, Deceased. I think I might read this letter to your Honor so you can get the purport of it, if you would like to have it read at this time.

“Gentlemen:

“Please be informed that request has been made by Lieutenant General Delos C. Emmons, by letter dated June 17, 1942, to Governor J. B. Poindexter, that all of the government land of Kahanahaiki and Makua in Makua Valley, Waianae, Oahu, be made immediately available to the Army [6] for war purposes.

“As the greater portion of the land in Makua Valley is covered by General Lease No. 1740 held by the L. L. McCandless Estate, wherein said lease provision is made for the withdrawal of any or all of the land covered thereby whenever it is required for any public purpose, therefore, pursuant to the request of Lieutenant General Delos C. Emmons, all of the land of Kahanahaiki and Makua in Makua Valley, Waianae, covered by General Lease No. 1740 is hereby withdrawn from the operation thereof for public purpose, to wit: For use by the Army for war purposes.

“General Lease No. 1740 is hereby cancelled effective June 29, 1942, the date to which rent under this lease has been paid.

“Very truly yours,

“/s/ L. M. W.

“L. M. WHITEHOUSE,

“Commissioner of
Public Lands.”

The Court: That was to whom?

Mr. Anthony: That was to the Trustees, Bishop Trust Company, Ltd., and Lester A. Marks, Trustees of the Estate of L. L. McCandless, Deceased.

The Court: That was canceled solely upon the authority contained in the lease that it could be canceled for public purposes? [7]

Mr. Anthony: Yes. At that point, to have that problem in mind, it might be desirable to read the cancellation clause, if I may, your Honor.

The Court: Yes.

Mr. Anthony (Reading): "It Is Mutually Agreed, That at any time or times during the term of this lease, the land demised, or any part or parts thereof, may at the option of the Lessor, on behalf of the Territory of Hawaii, or any person or persons, corporation or corporations, be withdrawn from the operation of this lease for homestead or settlement purposes, or for storing, conserving, transporting and conveying water for any purpose, or for reclamation purposes, or for forestry purposes, or for telephone, telegraph, electric power, railway or roadway purposes, or for any purpose, or for sale——"

Mr. Deuel: "Any public purpose."

Mr. Anthony (Continuing): "——any public purpose, or for sale for any purpose for which land may be sold under the provisions of Section 73 of the Hawaiian Organic Act as now or hereafter amended, and possession resumed by the Lessor, in which event the land so withdrawn shall cease to be subject to the terms, covenants and conditions of

this lease, and the rent hereinabove reserved shall be reduced in proportion to the value [8] of the part so withdrawn."

The evidence will show that this land was not withdrawn for any public purpose of the Territory and that the Lessor never, in fact, resumed possession.

The Court: Now, Whitehouse's letter was dated in June, what day?

Mr. Anthony: July 2.

The Court: July 2.

Mr. Anthony: And the cancelation was made effective June 29.

The Court: Four days before.

Mr. Anthony: We would like to offer those three documents in evidence, your Honor.

The Clerk: The General Lease will be Joint Exhibit B-1; the Assignment, B-2; and the letter dated July 2, 1942, B-3.

The Court: Received.

(Thereupon the documents above referred to were received in evidence as Joint Exhibits B-1, B-2, and B-3.)

Mr. Anthony: We next would like to offer in evidence General Lease No. 1741, dated December 29, 1925, between the Commissioner of Public Lands and James F. Woods for a term of twenty-one years. The lease contains the same withdrawal clause that I have just read. I will not repeat that, your Honor. Assignment from James F. Woods

to [9] L. L. McCandless, dated March 21, 1928; and a letter dated July 27, 1942.

The Court: July what?

Mr. Anthony: 27, 1942, from L. M. Whitehouse to the Trustees of the L. L. McCandless Estate, the first two paragraphs of which are substantially the same as the prior letter. The third paragraph reads as follows:

“As rent under this lease has been paid to December 29, 1942, and as there is no provision in law for the refund of any portion of the rent paid for the current six months, General Lease No. 1741 is hereby cancelled, effective December 29, 1942, the date to which rent under this lease has been paid. However, since the army requires this land be immediately available to it, we ask your cooperation in agreeing to sublease from yourselves to the army of this land for the remaining period to December 29, 1942. Such a sublease to the army, we understand, is permissible and you would thereby, in a measure, be refunded for such rent as has been paid to December 29, 1942.

“Very truly yours,

“/s/ L. M. W.

“L. M. WHITEHOUSE,

“Commissioner of
Public Lands.”

We offer those in evidence, your Honor. [10]

The Court: Received:

The Clerk: Joint Exhibit C-1 is the General

Lease; C-2 is Assignment of the Lease; and C-3 is the Letter.

(Thereupon, the documents above referred to were received in evidence as Joint Exhibits C-1, C-2, and C-3.)

Mr. Deuel: Did I understand your Honor to state that you will not entertain a motion to make a ruling in regard to the sufficiency of paragraph 3 of the Complaint, which has to do with the cancelation of these leases?

The Court: It might be appropriate for you to bring that up now in the form of an objection. I think on second thought that I would prefer to hear the plaintiff's case and then hear that as a defense.

Mr. Anthony: Mr. Marks, will you take the witness stand, please.

ALFRED LESTER MARKS

called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Will you sit down, Mr. Marks, please.

Direct Examination

By Mr. Anthony:

Q. Your full name, please.

A. Alfred Lester Marks.

Q. You were born in Hawaii, Mr. Marks?

A. I was. [11]

Q. And you are one of the trustees of the estate

(Testimony of Alfred Lester Marks.)

of L. L. McCandless, deceased? A. I am.

Q. At the time of the institution of this proceeding the Bishop Trust Company and yourself were co-trustees; is that correct?

A. I was executor of the estate and the Bishop Trust Company was administrator.

Q. And at the present time the executorship has been closed; is that it?

A. The probate has been closed and the estate is in the hands of the trustees.

Q. The trustees at the present time are who?

A. Mrs. Loy McCandless Marks, Herbert M. Richards, and myself.

Q. And you are the duly appointed, qualified, and acting trustees of the estate of L. L. McCandless, deceased? A. We are.

Q. And what relation do you bear to L. L. McCandless, deceased?

A. I am his son-in-law.

The Court: Whom else did you say? Did you name four trustees?

The Witness: No, three, Mrs. Marks and Herbert M. Richards. [12]

The Court: I was a little confused about your naming Marks there.

Q. (By Mr. Anthony): Mr. Marks, what is your business? Will you briefly state what businesses you have been in.

A. I am chairman of the board of trustees of this McCandless Estate. I also have some property of my own. I have recently resigned from being

(Testimony of Alfred Lester Marks.)

commissioner of public lands of the Territory and surveyor of the Territory. I have been in the contracting business. I am a civil engineer.

Q. Have you had any experience with ranches?

A. I have been ranch manager for the McCandless ranches ever since Mr. McCandless' death in the latter part of 1940.

Q. Mr. McCandless had certain ranches in the Territory here? A. He did.

Q. Will you describe those briefly.

A. The ranch at Waianae. There is a ranch over at Waiahole and Waikane. There is a small ranch down at Waimalu on this island, and there is a ranch of considerable size in south Kona on the island of Hawaii.

The Court: Where is Waimalu?

The Witness: Waimalu is just on the ewa side of Pearl City near Kalawao. Goes from Pearl Harbor up to the top of the Koolau Mountains. [13]

The Court: How big is that?

The Witness: A little over 2,000 acres, including the forest reserve land in it.

Q. (By Mr. Anthony): And what is the——

The Court: What did you call that section again?

The Witness: Waimalu.

The Court: Yes.

Q. (By Mr. Anthony): Now the ranches in the Waianae District were what, Mr. Marks?

A. The ranches in the Waianae District here originally contained the present Naval Ammunition

(Testimony of Alfred Lester Marks.)

Depot in Lualualei, an area below that area that is now occupied by the wireless communication area, and there was an area in Waianae on both sides of Pahehe Ridge, and also an area up in Waianae Valley that was called Puuanako. It also consisted of an area of land called Ohikilolo and Makua Valley, Kahanahaiki Valley, Keawaula, and Kuaokala. The ranch at present, though, is not anywhere near comprising all of that, because the ranching areas have been of diminishing size for some time.

Q. On December 7, 1941, state what lands were comprised in the McCandless Ranch at the Waianae District.

A. There was an area adjacent to the ammunition depot in Lualualei.

Q. Can you indicate that on the map?

The Court: Lualualei. [14]

A. It doesn't show it. Lualualei is up in here (indicating).

The Court: Why do you put that in with the Waianae, because it is in Waianae District?

The Witness: It is in the Waianae District.

Q. (By Mr. Anthony): Did you operate those lands more or less as a unit, Mr. Marks?

A. More or less. There were separate foremen. The foreman at Makua took care of the area also that was around the ridge and the area that was up in Waianae Valley. And he also had assistants that lived on the place that would act more as watchmen, though, would not make any definite decision.

(Testimony of Alfred Lester Marks.)

Q. Now, coming down to Lease No. 1740, that was a lease from the Territory; is that right?

A. That was a lease from the Territory.

Q. How many acres did that contain, Mr. Marks, approximately? A. Around—

Q. Have you a memo of it?

A. I don't know. It states on the lease; if I could see the lease, I could answer that. My recollection is that the two together were about 4700 acres.

Q. That is 1740 and 1741?

The Court: What are you looking at now? [15]

The Witness: Referring to Lease 1740.

Q. (By Mr. Anthony): It is in the schedule there?

A. It was 2275 acres, and Lease 1741 was 2517 acres.

Q. Did the McCandless Estate own any land in fee simple in that vicinity?

A. Adjacent to 1740 the lands of Ohikilolo were mostly owned in fee simple and some of the Keaau lands.

Q. What is the approximate area of Ohikilolo?

A. The Ohikilolo and Keaau aggregate about a thousand acres.

Q. What was that land used for?

A. That was also used for cattle.

Q. Directing your attention to this parcel of land at Kaena Point, was that owned by the McCandless Estate?

(Testimony of Alfred Lester Marks.)

A. That was owned in fee. That is part of the land of Keawaula.

Q. Was that used for ranching purposes?

A. That was.

Q. Mr. Marks, were there any improvements on Leases Nos. 1740 and 1741?

A. There were fences, corrals, and on 1740 there was a house that we occupied down there, together with a small guest cottage. There were also water troughs and other such equipment of a cattle ranch.

The Court: This lease '40 would describe [16] that area, excepting what kulianas and other small properties were individually owned, here at Makua, and this '41 as well, would it not?

The Witness: Yes.

The Court: McCandless had acquired title to some of these smaller holdings?

The Witness: To most of the kulianas.

Q. (By Mr. Anthony): Mr. McCandless had title to those?

A. There were only three or four that he did not have title to.

Q. Now, were those lands comprised by Lease 1740 and 1741 fenced, Mr. Marks?

A. They were.

Q. In 1941, December 7?

A. The lease 1740 was fenced and cross-fenced. It was cut into paddocks. 1741 had a wing fence across the top of it and a corral there, and also the boundaries of the area in general, as against the adjacent property, was fenced.

(Testimony of Alfred Lester Marks.)

The Court: Against the forest reserve?

The Witness: Against the forest reserve and against Kealia.

Q. (By Mr. Anthony): Was that Dillingham lease?

A. Dillingham had a Government lease.

Q. The land of Kealia? A. Kealia. [17]

The Court: Was the fence along this boundary, or was it a natural formation?

The Witness: That was a fence along that boundary. At the makai side of the property is a steep precipice and there was no fence along that.

Q. (By Mr. Anthony): When you use the expression "makai" on this map, that is in a westerly direction? A. I think it is due north.

Q. North? A. Due north.

Q. Due north, a line running from approximately Kaena Point——

A. Towards Waialua.

Q. Toward the land of Kealia, as indicated on this map? A. Yes.

The Court: You have a fence between the McCandless lease and his holding here?

The Witness: Yes. That is, in general, a ridge going along there. That is practically inaccessible. The cattle couldn't get over there. And then there is a cave down on the westerly portion, and the fence runs right up to the cave, so that as far as actual ranch management is concerned, the Ohikilolo area was a separate paddock from the Makua area, which is included in 1740. [18]

(Testimony of Alfred Lester Marks.)

Q. (By Mr. Anthony): What was the name——

Mr. Anthony: Withdraw that.

Q. (By Mr. Anthony): What did you have on this ranch on December 7, 1941, what kind of animals and livestock?

A. Cattle, horses, and pigs.

Q. Can you give us an estimate as to the number of animals that were on the ranch?

The Court: What date was that?

Mr. Anthony: December 7, 1941.

Mr. Deuel: Objection. I would like it to be made plain that the witness knows how many animals there were there of his own knowledge.

The Court: That is a subject you can examine him on.

Q. (By Mr. Anthony): You were the manager of that ranch, were you not?

The Court: Why do you take December 7, 1941? What is that date connected with outside of the bombardment?

Mr. Anthony: Well, immediately following the blitz the Army went in and took possession, and the troops were deployed throughout the area, and the fences were cut.

The Court: Before they asked for the land?

Mr. Anthony: Yes, and the cattle were scattered all over the countryside.

The Witness: The area included, in general, Leases 1741 and 1740. We had not had a count of the cattle, but [19] we were—it was carrying as

(Testimony of Alfred Lester Marks.)

many as we could put on it, and we estimated that there were about 1200 head there.

Q. (By Mr. Anthony): Now, after the blitz, Mr. Marks, did you communicate with your foreman, or did he communicate with you?

A. I do not recall whether I rang him up or whether he rang me up.

Q. What was his name? A. Rainy.

Q. Incidentally, he has a broken leg at the present time? A. He is in the hospital at Pahala.

Q. You tried to get him down here?

A. He is no longer employed by us. He is working for Kapapala Ranch, and he is in the hospital at Pahala.

Q. You talked with Rainy; is that right?

A. I did.

Q. And what did you learn from Mr. Rainy? What did he report to you?

Mr. Deuel: If the Court please, whatever Mr. Rainy or someone else may have told him is hearsay and we object to it.

Mr. Anthony: Just the fact of a report.

The Court: Mr. Rainy was his manager. He was the manager or superintendent of that, and what he told his [20] employer as to the number of head of cattle would seem to me to be permissible.

Mr. Anthony: We just want that in evidence, your Honor, for the proof of the fact that the report was made, not as to whether or not what Rainy said is true or false. He is not here for cross-examination, but it is certainly admissible to find out

(Testimony of Alfred Lester Marks.)

what report was made at the time and what he did pursuant to that report. This is just a preliminary question.

Mr. Deuel: I have no objection to his stating whether he got a report from Mr. Rainy or not, but details as to what Mr. Rainy may have told him I contend are hearsay, your Honor.

The Court: Overruled.

Q. (By Mr. Anthony): What did Rainy report to you?

A. Rainy reported that the troops were on the land, and I instructed him to cooperate in every way he could.

Q. And, so far as you know, he did that; is that correct? A. He did it.

Q. How soon after December 7 did you get down there?

A. I personally didn't get down there for about ten days, as I recall it.

Q. It was a little rough going in those days, was it not? A. It was. [21]

Q. Well, when you got down there, what did you observe?

A. The troops were occupying most of the available houses. They were busy putting up barbed wire entanglements. They had torn down fences and were using any available material that could be used in the creation of their defensive positions.

Q. You interposed no objection at all to that work? A. No.

Q. You were glad to see it done?

(Testimony of Alfred Lester Marks.)

A. I was. We offered every assistance that we could be to them.

Q. Now, what did you observe as to the condition of the fences?

A. The fences were down. The wires had been cut. The pipe lines taking water to the troughs had been cut. In two instances that I remember the troughs had been turned over, and in another instance where there was a permanent concrete watering trough a machine gun had been used to shoot the corner off of it. They seemed to think that mosquitoes were breeding in it.

Q. What happened to the paddocks?

A. It was all one paddock. The fences between the paddocks were—the wire was down. In the wire fence you may only cut between one post, but the rest of the fence goes down unless there are intervening anchor posts, which there usually [22] are not. Your fences are anchored at the corners.

Q. Describe the character of this wire fence. How many strands?

A. It was mostly five strand; in some instances, six.

Q. Smooth wire or barbed wire?

A. Smooth wire. They were erecting also a lot of barbed wire barriers all over the place. One didn't like to be too nosey in those days, but just going down there between our house on the beach and the ocean there were six distinct lines of barbed wire, each of them about five feet wide and eight feet high, and there was an expediency of a

(Testimony of Alfred Lester Marks.)

landing down there, and they were taking all material that they could get hold of and every precaution that they could to be prepared for it.

Q. Now, what happened to the cattle?

A. The cattle just were dispersed. Some of them were still around there. Some of them were shot. Others went up into the forest reserve, and the cowboys were out tending to as many of them as they could, but there were troops all over the land. These troops were also up in the mountains shooting, and the ranching activity just was a catch-as-catch-can proposition from there on.

Q. Did you make subsequent trips to the Waianae and Makua lands in these leases?

A. Yes. We were down there approximately every week-end [23] until we were ordered out in 1942, I believe it was, the latter part of '42.

Q. Did you examine the Pahehe Ridge area? Did you get up in there?

A. Yes.

Q. What happened to the fences up there?

A. They were also cut.

Q. The same was true as to Makua?

A. Makua.

Q. How about Kahanahaiki Valley?

A. That also. The same condition prevailed throughout the area.

Q. The entire area covered by these two leases?

A. By these two leases. This Pahehe Ridge, though, is down in Waianae. That is not under these two leases.

(Testimony of Alfred Lester Marks.)

Q. Now, did you give any instructions to your foreman in regard to rounding up cattle?

A. Not at that time.

Q. I mean subsequent to the first visit that you made down there?

A. Not any specific instructions until we got orders to get out. When we got orders to get out, then we rounded up all we could.

Q. Will you describe the character of that task of rounding up these cattle. [24]

A. Well, we drove all that we could. We got as many cowboys as available and went into the Makua, Kahanahaiki, Keawaula area and a couple of times went up on Kuaokala and drove all those that we could surround. But with the lack of fences it was a most difficult task. The first drives that were relatively successful took over, I believe four hundred and some odd cattle, and then after that it became more difficult. We would have to trap and we would have to chase them up the mountains and behind the crags, and it was like a merry-go-round. And those we also rounded up and did the best we could to catch everything we could, until we had to stay out.

Q. Now, you have testified a moment ago that the water troughs and the pipe lines were cut. What effect did that have on the characteristics of the cattle to stay put?

A. That drove the cattle up into the forest reserve.

Q. In other words, they were thirsty?

(Testimony of Alfred Lester Marks.)

A. They were thirsty, and in the forest reserve there were small holes where seepage water would accumulate, and the run-off from the rain. Wasn't as extensive as it was in the open country, and the result of cutting those pipe lines and depriving the cattle of water virtually drove them up onto the forest reserve.

Q. Now, can you give us an estimate of how many cattle were lost as a result of these activities that you have just [25] described on the McCandless Ranch? A. Our estimate is 366 head.

Q. And can you state in what approximate areas those cattle were lost.

A. There were thirty of them were lost down in the area in Waianae around that Pahehe Ridge area. There were eighty of them lost in the Makua area.

The Court: How many? Eighty?

The Witness: Eighty.

A. (Continuing): And about 250 in the Keawaula and Kuaokala area, and in addition to that there were four head killed in Makua and two killed at Waimalu.

Q. How were they killed?

A. Well, two in Makua were shot, two were run into by trucks or tanks, and those in Waimalu were shot.

Q. Did they have trucks down there? Did the Army have trucks down there?

A. Yes, trucks and tanks and all manner of motor vehicles.

(Testimony of Alfred Lester Marks.)

Q. Did they have any gun emplacements in the ridge up in the forest reserve?

A. They had gun emplacements and pill boxes and anti-aircraft locations, and also gun emplacements on the beach, and some mobile artillery at two ends of the Makua Beach.

Q. In other words, the troops were deployed over the [26] entire area? A. They were.

Q. Did you lose any horses as a result of the taking over of the ranch?

A. There were two saddle horses that were killed. The area adjacent to the railroad track the fence was cut and at night the horses went through the fence and these two saddle horses were killed.

Q. Can you give us the reasonable value of those cattle as of the date they were lost subsequent to December 7, 1941?

A. We valued them at \$100 a head, which included steers, cows, bulls, and the whole works.

Q. How about the two horses?

A. We valued those at \$125 a piece.

Q. Did you have any other animals on this ranch? A. We had quite a few pigs.

Q. Where were the pigs holding forth?

A. The pigs' headquarters were in Kahanahaiki Valley in the vicinity of Peter Andrews' house. That is one of the ranch houses. But they roamed all over the pasture and went clear up into the forest reserve. They were not fully domesticated, you might say.

(Testimony of Alfred Lester Marks.)

Q. Can you give us some idea of how many pigs there were there?

A. About two hundred. [27]

Q. And what happened to the two hundred?

A. Well, they just were dispersed also. The troops were living on pork and they were giving pigs away to other people. They just disappeared is all. A lot of them were shot.

Q. What is your opinion as to the fair value of those pigs as of the date which they were destroyed?

A. I valued them at \$25, which I think is rather on the under side than on the upper side.

The Court: Irrespective of size?

The Witness: That is correct. In placing a value on these it is necessary to visualize an average pig and put a fair price on it, is the procedure that I followed.

Q. Now, Mr. Marks, did you have any talk with the Military Governor about this business of cutting the fences to see whether anything could be done?

A. I wrote a letter to the Military Governor, because it seemed that there was unnecessary cutting of fences and leaving them open, which would cause the cattle to get onto the highway and in other cases would just disappear and leave. They would be further dispersed. In response to my letter an order was issued relative to the cutting of fences which stated that when fences were cut that they should mend them at night.

Q. Was anything ever done about that [28] order?

(Testimony of Alfred Lester Marks.)

A. I didn't see any effect of it at all.

Q. Did you ever talk to General Green about this? Did you have any conversations with Green?

A. Not personal. I had a letter with him, I believe.

Q. I hand you a letter dated 1 January 1942. Did you receive that from General Green?

A. I did.

Q. That was in response to your letter, which is attached there?

A. That was in response to my letter of December 29, 1941.

Mr. Anthony: We offer them in evidence.

Mr. Deuel: I have no objection to these going in on the understanding that they go in only to show the fact that these statements were made, but I would object to their going in for the purpose of showing the truth of the statements therein.

Mr. Anthony: We decline the restriction, your Honor. We offer them for all purposes. This is an exchange of correspondence, and if they contain any admissions by General Green or anybody else, it is relevant to this case. First is a letter dated December 29, 1941, addressed to the Military Governor by A. Lester Marks, calling attention to the fact that they have been endeavoring to fatten the cattle in compliance with the food conservation program, and the fences [29] having been cut and the cattle allowed to disperse. He requested that attention be called to this, and there is a reply.

(Testimony of Alfred Lester Marks.)

Mr. Deuel: It is common practice, your Honor, as I am sure you know, when a complaint is made to the Military authorities of this kind to make a reply of this kind, and it does not necessarily acknowledge the truth of the complaint. As I say, for the fact that the complaint was made and for the fact that General Green acknowledged it and said that action be taken I will not object, but for the truth of the statement in the complaint I do object.

Mr. Anthony: Here is the witness on the stand who wrote the letter. He is subject to cross-examination. That objection is purely captious, your Honor. Here is the witness who wrote the letter.

The Court: I didn't get it that he was objecting to this letter or the contents of it, but to some admissions by Green, as I understood it.

Mr. Anthony: There is in the next letter, but there isn't in this one here. Green says in his reply:

This matter has been referred to the Commanding General and we hope in the future "it will be possible for all parties to repair or install temporary barriers at any place where it is necessary to cut any fence." That is a perfectly understandable answer. [30]

The Court: Let's see what the rest of it is.

Mr. Anthony: Shall I read the letter, your Honor?

The Court: Yes.

Mr. Anthony: "Dear Sir:" This is to the Military Governor, dated December 29, 1941.

(Testimony of Alfred Lester Marks.)

“The estate of L. L. McCandless has on various parcels of land, located on this island, many herds of beef cattle which, under instructions from the office of the food conservation head, we are endeavoring to fatten for local consumption.

“In a number of instances and particularly in the Waianae areas fences have recently been cut and the cattle allowed to disperse over the countryside. A number of these we have been unable to gather in.

“While we do not desire to make a request that would impede the preparations for national defense and also while assuring you of our desire to continue our cooperation to the fullest extent of our resources, may I suggest an order to field parties that when fences are cut, temporary barriers be installed at night to prevent the cattle from straying onto the highways and becoming lost.

“Thanking you for your consideration of this matter and again assuring you of our desire to cooperate in any way, I remain [31]

“Sincerely,

“/s/ A. LESTER MARKS,

“A. LESTER MARKS,

“Executor, Estate of

“L. L. McCandless.”

The reply is:

“Dear Sir:

“Receipt of your letter of December 29, 1941, relating to destruction of some fences is acknowledged.

(Testimony of Alfred Lester Marks.)

“This matter has been referred to the Commanding General Hawaiian Department with the hope that in the future it will be possible for all parties to repair or install temporary barriers at any place where it is necessary to cut any fence.

“Thanking you very much for calling this matter to our attention, I am

“Sincerely yours,

“/s/ THOMAS H. GREEN,

“THOMAS H. GREEN,

“Colonel, J.A.G.D.,

“Executive.”

The Court: Objection, if it still is made, is overruled.

The Clerk: Libelant's Exhibit A.

(Thereupon, the document above referred to was received in evidence as Plaintiff's Exhibit A.) [32]

Mr. Anthony: We also offer in evidence a letter dated January 15, 1942, from Thomas H. Green, on the stationery of the Office of the Military Governor, Thomas H. Green, Colonel, addressed to the witness, reading as follows:

“Dear Mr. Marks:

“I am directed by the Military Governor to advise you that in accordance with the suggestion contained in your letter of 29 December 1941, an Operations Memorandum relative to the cutting of fences by

(Testimony of Alfred Lester Marks.)

troops, copy of which is attached hereto, has been issued, and to thank you for bringing the matter to his attention.

“Yours very truly,

“THOMAS H. GREEN,”

to which is attached Operations Memorandum Number 12, “Fences Inclosing Pasture Lands.”

“1. In a number of instances, and particularly in the Waianae Area, fences have recently been cut and the cattle allowed to disperse over the countryside. The owners have been unable to round up a number of these.

“2. It is desired that where troops find it necessary to cut fences, temporary barriers be installed to prevent the cattle from straying on the highways and becoming lost.

“By comand of Lieutenant General Emmons:

“J. LAWTON COLLINS, [33]

“Colonel, General Staff Corps,

“Chief of Staff.

“Official: William E. Donegan

“Distribution: ‘C’.”

The Court: I can’t admit that letter as an admission. It very clearly impresses me that what it means is that a complaint was made regarding cattle.

Mr. Anthony: That is right. The witness has already testified as to the fact, but what I want

(Testimony of Alfred Lester Marks.)

to bring out is that this order was issued and nothing was done about it.

The Court: Yes.

Mr. Deuel: In this instance, your Honor, the order spoken of here does contain the statement that fences have been cut and cattle dispersed.

Mr. Anthony: There is no dispute about that.

Mr. Deuel: Not as far as the witness is concerned, but I object to it as an admission on the part of the Government.

The Court: Well, I say I can't accept that as an admission on the part of the Government.

Mr. Anthony: I am not offering it as an admission. I am offering it as what the Army did in pursuance to the request.

The Clerk: Plaintiff's Exhibit B.

(Thereupon, the document above referred to was received in evidence as Plaintiff's Exhibit B.) [34]

Q. (By Mr. Anthony): After that order was issued, Mr. Marks, did they do anything about your suggestion? A. No.

Q. Did you call it to their attention down there at Waianae?

A. I visited two of the field headquarters and made complaint to them and pointed out the fact that this order had been issued, and they didn't even know about it.

Q. Did you get any complaints from the Navy

(Testimony of Alfred Lester Marks.)

about your cattle straying down there in the Navy's domain?

A. We did. We got a couple of telephone messages from the Navy that our cattle had strayed upon the area that was the Naval Wireless Station down there, and we dispatched cowboys to round them up, but didn't get any.

Q. Is this an original of a letter you got from the Fourteenth Naval District about straying cattle? A. It is.

Q. And that refers to cattle in the Waianae District that were dispersed by reason of the facts you have testified to? A. It is.

Q. And that is a copy of your reply attached; is that right? A. It is.

Mr. Anthony: The reason we are taking as much time [35] as we are, your Honor, we don't know what the Government's defense is; I didn't know until just a few minutes ago that there was any contention that they hadn't cut these fences; I don't know whether there is or not, or whether there is any contention that the cattle weren't spread over the countryside; that's why I am putting this evidence in.

Mr. Deuel: No objection.

Mr. Anthony: I would like to offer in evidence, your Honor, a letter from the Fourteenth Naval District, Chief of Staff, dated February 8, 1942, addressed to McCandless Estate, and the reply dated February 10, 1942.

The letter from the Fourteenth Naval District reads as follows:

(Testimony of Alfred Lester Marks.)

“Gentlemen:

“A number of cows are reported to be within the fence recently constructed at the Naval Radio Station at Lualualei, Oahu, Territory of Hawaii. According to the best information available to the officer in charge there, the cows are your property.

“If actually the cows belong to you, will you kindly take steps at once to remove same? If not, and you know to whom they belong, will you please advise the Commandant? The cows moving about the station during the night are a constant source of alarm to sentries and there is a strong possibility that they might be killed by one of [36] the Marine Patrols. The Navy Department assumes no liability for injuries to or killing of livestock trespassing on Navy property.

“Very truly yours,

“J. B. EARLE.”

And the reply is as follows:

“We beg to acknowledge receipt of your letter under date of February 8th relative to cattle on the premises of the Naval Radio Station at Lualualei.

“We thank you very much for calling this to our attention. These cattle were in pasture in Waianae Valley and we have not been able to locate them since the fences were cut and left open by the Army last December.

“I am ordering our ranch manager to immedi-

(Testimony of Alfred Lester Marks.)

ately communicate with the Radio Station Commandant relative to access to the reservation to round them up.

“Again thanking you, I remain,

“Very truly yours,

“A. LESTER MARKS.”

Q. (By Mr. Anthony): Did you get those cattle? A. No.

Mr. Anthony: We offer that letter in evidence, your Honor.

The Court: Received. [37]

The Clerk: Plaintiff's Exhibit C.

(Thereupon, the document above referred to was received in evidence as Plaintiff's Exhibit C.)

Q. (By Mr. Anthony): How was it you didn't get them?

A. The cowboys went over there two or three times to round them up and couldn't find them.

Q. Did you know an Army officer by the name of Charles S. Marek?

A. I did. He was a colonel and was the Army real estate officer.

Q. He was in the Engineers, was he not, had charge of acquisitions of real estate?

A. He was.

Q. On behalf of the Army?

A. He was. Office on Punahou School grounds.

Q. Did you have any conferences with him in

(Testimony of Alfred Lester Marks.)

regard to the occupation by the Army of the McCandless ranches? A. I did.

Q. Incidentally, after they went into possession, did the army ever get out of possession of this area? A. They have not.

Q. It was never returned to you at any time?

A. It was not.

Q. In other words, they were continuously in possession from and after December 9, or whenever they went in there, 1941? [38]

A. 1942, I believe.

Q. 1942, I mean.

A. Well, we were ordered out in 1942. They came in just after the blitz, and we got along as best we could until we were officially ordered out.

Q. In other words, you were in there with the Army from the time of the blitz on until the time you were ordered out; is that right?

A. That is correct.

Q. And you were trying to do the best you could there? A. Yes.

Q. Did you have any conferences with Marek in regard to how they were going to handle this proposition?

A. I had a number of conferences with Colonel Marek, and he favored the Army taking a lease of the area, and that was seriously considered at one time. They were going to take a sub-lease from us, and they were also going to take the cattle, even if they had to shoot them, as they expressed it.

(Testimony of Alfred Lester Marks.)

They wanted that area. And I went out and went into the proposition with a civilian employee of the Army Real Estate by the name of Jackson.

The Court: Well, there are two distinct areas there represented by those two leases. Which area did they want?

The Witness: They wanted both of them. [39] They wanted both of those areas, plus our fee simple land in there, but excluding the area at Kaena Point.

Q. (By Mr. Anthony): Well, I gather that those negotiations "blew up" or "petered out"; is that right?

A. The school of thought that wanted to acquire title and wanted to keep it as a permanent installation even after the war apparently won out, because that is the pattern that has been followed even to the extent of condemnation of fee simple holdings within the leasehold.

Q. Incidentally, the fee simple lands you are referring to have in fact been condemned by the United States? A. They have.

Q. That is, the land that was owned by the L. L. McCandless Estate in that area was condemned in Civil No. 485; is that right?

A. That is correct.

The Court: Was any order ever made by the Governor setting over the Government's land there to the Army and Navy?

The Witness: It was immediately made, immediately upon the cancellation of our leaseholds.

(Testimony of Alfred Lester Marks.)

The Court: All right.

The Witness: A revocable permit, as I recall it, was issued.

The Court: You speak of being ordered out. You [40] construe the letters of Whitehouse to be your order to get out?

The Witness: Yes, we were told to make it available for their exclusive use in one of the communications.

The Court: Those letters that you referred to?

The Witness: Yes.

The Court: The Army itself didn't order you off? /

The Witness: They came down and moved us.

Mr. Anthony: That is the letter I have right here, your Honor.

The Court: All right.

Mr. Anthony: At this time we offer in evidence a letter dated June 11, 1942, from Charles S. Marek, Major, Corps of Engineers, Real Estate Officer, addressed to Bishop Trust Company, Limited. The date of it is June 11, 1942.

"Gentlemen:

"This is to confirm decision made by the Department Commander that the entire Makua and Kahanahaiki Valleys, excepting railroad and road rights-of-way paralleling shore line, be acquired by purchase.

"Since the utilization of these valleys is urgently needed for training purposes, it is desired that cat-

(Testimony of Alfred Lester Marks.)

tle located in the area be rounded up and moved to another locality as soon as practicable. [41]

“Negotiations for this acquisition will be initiated by this office, together with the negotiations for leasing Mokuleia and Kuaokala Forest Reserves, Kuaokala and Keawaula Land Sections. Removal of cattle from the land other than Makua and Kahanahiki may be accomplished at a later date.

“The Army has no objection to removal of the present dwellings to other locality if such action is desired by the present owner.

“In this connection, it is requested that the Army be permitted to fully occupy for military purposes, the Makua and Kahanahaiki Valleys, not later than June 20, 1942.

“Very truly yours,

“CHARLES S. MAREK.”

The Court: Well, those two valleys, don't they generally refer to both of those as Makua?

The Witness: The district is called Makua District, perhaps erroneously, but that is the accepted terminology.

The Court: All right.

Q. (By Mr. Anthony): Well, in accordance with the request, did the Army have exclusive occupation on the date that they asked, June 20, 1942?

A. I think it took us a little longer than that [42] to get out of there, but we were, you might say, tolerated for a short period after that, but we made every effort to get out on that time.

(Testimony of Alfred Lester Marks.)

Mr. Anthony: We offer that letter in evidence, your Honor.

The Court: Exhibit——

The Clerk: Plaintiff's Exhibit D.

(Thereupon, the document above referred to was received in evidence as Plaintiff's Exhibit D.)

The Witness: In that connection, if I might elaborate a point, there were certain installations on our fee simple land that the Army were replacing over in Ohikilolo right next door, and we couldn't move over until those replacements, of house particularly, were installed, so the period would run beyond the date mentioned in that communication.

Q. (By Mr. Anthony): Incidentally, how many men did you have down there, approximately?

A. There were five or six regular employees and a number of casual employees who lived in the district and would get casual employment.

Mr. Anthony: At this time, if your Honor please, we offer in evidence two letters each dated June 17, 1942, one from Delos C. Emmons, Lieutenant General, to the Governor, Joseph B. Poindexter, and the other from Delos C. Emmons [43] to Charles M. Hite, Acting Governor, the first of which reads as follows:

"My dear Governor Poindexter:

"Reference is made to your letter of 29 November 1941, wherein you advise that the lands within Makua and Kahanahaiki Valleys, this Island, will be available to the War Department.

(Testimony of Alfred Lester Marks.)

“In this connection, please be advised that it is of vital importance to the War effort that these lands be made available immediately. It is therefore requested that General Lease No. 1740 to L. L. McCandless be withdrawn, and that these areas be turned over to the exclusive use and jurisdiction of the War Department.

“Attached for your information is copy of letter addressed to the Bishop Trust Company, Limited, on this subject.”

The other letter is addressed to Mr. Hite, same date.

“This is to acknowledge letter from the Commissioner of Public Lands——”

This is a memorandum, your Honor.

“This is to acknowledge letter from the Commissioner of Public Lands, dated July 2, 1942, and indorsement thereon by Governor Poindexter, informing this Headquarters that General Lease No. 1740, covering Government land in Makua has been cancelled, permitting the War [44] Department——”

The Court: How come you say these letters were dated June?

Mr. Anthony: July. Oh, I am confusing your Honor. I did say June. I am mistaken. The first one I read was June 17, 1942.

The Court: Yes.

Mr. Anthony: And the second one is July 17, 1942.

The Court: Yes.

Mr. Anthony: I guess in the meantime Governor Poindexter had gone to Washington.

(Testimony of Alfred Lester Marks.)

“This is to acknowledge letter from the Commissioner of Public Lands, dated July 2, 1942, and indorsement thereon by Governor Poindexter, informing this Headquarters that General Lease No. 1740, covering Government land in Makua has been cancelled, permitting the War Department to utilize this property for training purposes.

“Since it is desired to use this area largely for firing of large caliber guns, it is felt that from the standpoint of safety, utilization of upper lands covered by General Lease No. 1741, may be affected. For this reason, it is requested that General Lease No. 1741 be cancelled and control of these lands be temporarily turned over to the control of the War Department for the duration of the existing war. [45]

“Very sincerely yours,

“DELOS C. EMMONS.”

We offer these two letters in evidence, your Honor.

The Court: Exhibit G.

The Clerk: E.

The Court: E?

The Clerk: Yes.

(Thereupon, the documents above referred to were received in evidence as Plaintiff's Exhibit E.)

The Court: I don't see where there is any relation between Lease 1741 and 1740 for using that for range purposes. It is not combined in any way. The

(Testimony of Alfred Lester Marks.)

letter of Emmons to Hite says they want to use this Makua Valley here for range purposes and that injury might be done to property on the forest reserve behind. I don't follow that.

The Witness: The area under Lease 1741 had numerous military emplacements upon it, installations.

The Court: Yes. I was thinking only of this letter where in order to justify the taking over of 1741 he says it is behind or above Lease 1740 in Makua Valley there and that property on it might be injured.

The Witness: I agree with you, your Honor, but we were not questioning any of the military motives at the time.

Mr. Anthony: May I ask how your Honor is going to [46] handle this trial this afternoon.

The Court: Suppose we adjourn now for luncheon, and what time do you want to come back?

Mr. Anthony: Whatever your Honor says. It is entirely convenient to me at any time.

The Court: I guess we can get started at half past one.

Mr. Anthony: Very well, your Honor.

(Thereupon, at 11:35 a recess was taken until 1:30 of the same day.)

Afternoon Session 1:35 P.M.

Mr. Deuel: Before we proceed, your Honor, I have a witness, Colonel Fielder, who is here in the

Army but is on orders to make a trip to Washington on Thursday morning at the latest, and by agreement with Mr. Anthony and if it is agreeable with your Honor, I would like to call him at ten o'clock tomorrow morning whether it happens to be out of turn or not.

The Court: All right.

ALFRED LESTER MARKS

resumed the stand and testified further as follows: [47]

Direct Examination

(Continued)

By Mr. Anthony:

Q. Mr. Marks, you have had considerable experience, have you not, in establishing the rental value of real estate? A. I have.

Q. Both in your capacity as Commissioner of Public Lands and as the representative of an owner of lands in this Territory? A. I have.

Q. Do you have an opinion as to the fair and reasonable rental value of the land comprised by Leases 1740 and 1741? A. I have.

Q. As of the date on which your lease was canceled? A. I have.

Q. What, in your opinion, was the fair rental value of that land comprised in those two leases as as of that date?

Mr. Deuel: Objections, your Honor. I wish at this time to interpose an objection to the taking of evidence, of testimony regarding the valuation of these leases on the following grounds: (1) that

(Testimony of Alfred Lester Marks.)

there is no cause of action stated against the United States in so far as the use of the land is concerned, (2) that there is no cause of action allowable by the Enabling Act or the Private Law under which this action is brought for use and occupancy, (3) that the leases in question were in fact validly canceled, and (4) [48] that there is no compensable interest as against the United States for the taking of this property.

The Court: The last one was what?

Mr. Deuel: No compensable interest in the McCandless Estate for the taking and use of this land.

The Court: No compensable interest in the McCandless Estate?

Mr. Deuel: That's right, your Honor.

The Court: I suppose you could elaborate that with argument or reason. This last proposition standing alone doesn't impress me as meaning much. What do you mean? No compensable interest in the McCandless Estate for the taking—well, it wasn't taking in accordance with the provisions for taking and it would sound more like a trespass. What do you mean, no compensable interest?

Mr. Deuel: What I mean by this, your Honor, is that it is my interpretation that under the provisions of the Organic Act, particularly Section 91—First of all, as your Honor knows, the Public Lands of the Territory at the time of annexation were ceded in fee to the United States.

The Court: Yes, I know that.

Mr. Deuel: Thereafter, by Section 91 of the

(Testimony of Alfred Lester Marks.)

Organic Act the use, management and control of these lands were placed in the Territory, but the fee title remained in the United States, and that use, management, and control in the Territory [49] were until such time as the President or Governor or Congress should re-take the use of it for the United States.

The Court: The Territory was given the right to make contracts of leases and, in some instances, sale.

Mr. Deuel: That is correct.

The Court: Those contracts must mean something. They must have some compensable value at least in accordance with the terms of the contract.

Mr. Deuel: I am speaking as against the United States, not against a third party. My contention is that under the Organic Act the United States was at all times in a position to re-take this land without payment of compensation.

The Court: The Territory was the representative. It acted as an agent, manager. I don't follow your statement that there was no compensatory value if they were violated even though the United States is the fee holder.

Mr. Deuel: On that, your Honor, my contention is that pursuant to Section 91 of the Organic Act the Federal Government at any time, by its action, can re-take this land, that a lessee from the Territory has only an interest, in so far as the United States is concerned, compensable to that of a licensee subject to termination at any time.

(Testimony of Alfred Lester Marks.)

The Court: A licensee has some rights. Well, go ahead with your argument. [50]

Mr. Anthony: That is the ultimate issue in this phase of the case, which I thought we were going to argue when we completed the proof, but I am prepared to argue it right now.

The Court: The objection is overruled for the time being.

A. The rental of \$1,125 a month, a thousand a month being the pasture area in general and the \$125 a month being the rental that I placed upon the house and guest cottage.

Q. (By Mr. Anthony): At what rate is that per acre, Mr. Marks?

A. That works out around \$2.50 an acre.

Q. Per annum? A. Per annum.

Q. How does that compare with leases of similar land in the vicinity?

A. That is cheaper than similar land sold at public auction and in private negotiation about that time.

Q. Ranch land?

A. Ranch land, pasture land.

Q. At what price were those areas sold?

Mr. Deuel: Objection. I think we should have the dates of this, your Honor.

Q. (By Mr. Anthony): Will you give us the date. Will you give us the approximate date. [51]

Mr. Deuel: Those should not come in if they are later than the date of this action.

A. I don't have them immediately available.

(Testimony of Alfred Lester Marks.)

The Court: Well, do you have any lands in view?

The Witness: Yes, there was a land in Waianae was at public auction sold. It was after this. It went about \$3.50 an acre.

The Court: How big a tract?

Mr. Deuel: Your Honor, I move that that be stricken. He said this sale was a later date. At least, I understood him to so say, and a sale at a later date would not be permissible for purposes of comparison.

The Court: How much later?

The Witness: About a year.

The Court: That may be stricken.

Q. (By Mr. Anthony): Well, in your opinion the figure of \$2.50 per acre per annum is a fair and reasonable valuation as of the date this lease was canceled; is that right? A. It is.

Q. Describe briefly those two houses, or the house and the guest cottage. How many rooms?

A. The guest cottage had three bedrooms and a small kitchen and a bathroom. The house had a living room, four bedrooms, and a kitchen, and the house was up quite high off the ground, and it had a cellar that had a concrete floor [52] and head room, and there were servants' quarters down there.

Q. Did it have a water system?

A. Water system, gas.

Q. Electric lights? A. Gas lights.

The Court: Rock gas?

The Witness: Rock gas.

(Testimony of Alfred Lester Marks.)

The Court: And the water system was rain water?

The Witness: No, the water came from a kuliana up in the valley. The kuliana, belonging to Mr. McCandless, had a spring on it, and water was piped right down to the house, and there was also a shallow well adjacent to the house that was occasionally used.

Q. (By Mr. Anthony): Mr. Marks, to recapitulate, you estimated that by reason of the deployment of the troops and the action of the Armed Forces subsequent to December 7, 1941, you lost 366 head of cattle; is that correct?

A. That is correct.

Q. And you computed that at \$100 a head?

A. I did.

Q. Making a total of \$36,600; is that right?

A. That is correct.

Q. Now you have estimated that you lost 200 pigs and you put a price on those of \$25.

A. I did. [53]

Q. That makes a total of \$5,000; is that right?

A. That is correct.

The Court: How much did you say the cattle were?

The Witness: One hundred dollars a head.

The Court: Yes, but the aggregate would be?

Mr. Anthony: \$36,600.

The Court: Yes. And the pigs, you say?

The Witness: Five thousand dollars.

Q. (By Mr. Anthony): Now, was the McCandless

(Testimony of Alfred Lester Marks.)

Estate put to any expense in rounding up the cattle that had been dispersed over the countryside by reason of the Army activities that you have testified to?

A. We were.

Q. How long a period did that cover, that rounding-up process?

A. We were at it from the time of the blitz until we were completely moved out, and, in fact, we did some rounding up occasionally after the date upon which we were informed to make the land available for the use of the Army.

Q. And do you have any estimate as to what the cost of rounding up your cattle—you did round up some cattle, did you not?

A. We did.

Q. Approximately how many?

A. Almost 700, as I recall, 600 and some, 690—697 is [54] the figure—I will check it, however—it occurs to me—I would like to check it, however. Six hundred ninety-three.

Q. How much did it cost to round those up?

A. The 425 that were immediately available in Makua Valley there I estimate cost us \$2 a head. There were 229 of them that were over at Keawaula and the upper ridges of Makua, I estimated cost \$10 a head; and there were 39 that were caught up on Kuaokala there and were virtually dragged down by their heels. And I estimated those at \$25 a head.

Q. And on that basis, what is your total estimated cost of rounding up these 693 cattle?

A. \$4,115.

(Testimony of Alfred Lester Marks.)

Q. You mentioned two horses that were killed. What was the fair and reasonable value of those horses? A. \$125 apiece.

Q. Or \$250 for the two of them. Did you have any redwood posts there on the ranch?

A. We did.

Q. What were they used for?

A. Those were fence posts.

Q. Unused? A. They were unused.

Q. That is an imported item, is it not?

A. That is an imported item.

Q. And how many did you have there? [55]

A. We had about 200 of them in the yard at my house there, and when the Army moved in, they set up the kitchen, which was a field kitchen, right in my front yard, and they used those redwood posts for firewood.

Q. And what is the fair and reasonable value of those posts, those 200? A. \$80.

The Court: They used mighty poor firewood.

Q. (By Mr. Anthony): Did you have any algaroba beans there, Mr. Marks? A. We did.

Q. What are they used for, incidentally?

A. They are picked up in the fall and stored and used as cattle feed.

Q. They fatten cattle, do they not, in this country? A. They fatten cattle.

Q. How many bags did you have there, approximately? A. We had 400 bags.

Q. And what was the fair and reasonable value

(Testimony of Alfred Lester Marks.)

of those 400 bags of algaroba beans? A. \$60.

The Court: \$60 for the 400 bags?

The Witness: For the 400 bags.

Q. (By Mr. Anthony): The total of the items of livestock and the personal property that you have just testified to, [56] in the aggregate, plus the cost of rounding up the cattle is, \$46,155; is that correct?

A. That is correct. The item of 500 jute bags is also in there.

Q. What is that?

A. Those were empty bags that we filled with beans. They had not yet been filled. These bags were taken and filled with sand and made into sand bag emplacements.

Q. These jute bags are a part of the ranch's equipment, are they not?

A. They are part of the ranch's equipment.

Q. At what price did you put those, Mr. Marks?

A. I put them at 10 cents apiece, or \$50 for those.

Q. Now, you have testified that the fair market value of the land comprised in the two Government leases was \$1,125, or what was that \$1,125?

A. Per month.

Q. Per month? A. That is correct.

Q. And how many months did the lease have to run? A. The lease had sixty months to run.

Q. And what, then, is your valuation of the leasehold value as of the date——

A. \$67,500.

Q. Sixty-seven—— [57]

(Testimony of Alfred Lester Marks.)

A. Sixty-seven thousand five hundred.

Q. That is as of the date the lease was canceled and you were excluded from possession completely; is that right?

A. That is my recollection of the figures. That is five years ago and I would have to check the dates. But in computing our losses we figured that we had been deprived of it for five years, which is sixty months.

The Court: Both leases expired the same time?

Mr. Anthony: Yes, your Honor.

The Court: July?

Mr. Anthony: December 29, 1925. They are for a term of twenty-one years, I think.

The Court: 1740 evidently expired June 29.

Mr. Deuel: Your Honor, they are correct in their statement. The expiration date, according to the lease, had it never been canceled—both leases would have been the 29th of December, 1946. The cancellation dates that we are talking about were two different dates.

The Court: Yes. So you figure it then from December 29, 1941, to get your five years, December 29, 1941?

The Witness: It included 1942, 1943, 1944, 1945 and 1946 up to December 29.

Q. (By Mr. Anthony): Mr. Marks, you had substantial improvements on these two leases, did you not? A. We did. [58]

Q. You have not made any claim in this pro-

(Testimony of Alfred Lester Marks.)

ceeding for the value of those improvements, have you?

A. Not in this proceeding, except on—no, not in this proceeding. I was going to say, except on our fee simple land, but that is the subject of another action.

Q. The reason being your position is that the leases were improperly canceled and that the improvements would revert to the lessor at the end of the term; is that right? A. That is correct.

Q. You previously presented your claim before a committee of the House of Representatives, did you not? A. I did.

Q. At that time you didn't know whether or not the leases were going to be—Were you definite that the leases were going to be canceled at that time?

A. At that time the leases had been canceled and the claim before the House of Representatives was substantially what I have recited.

Q. I see. You also presented a claim to the Army, did you not? A. To who?

Q. To the Army. A. I did.

Q. That was prior to the claim submitted to the House of Representatives Subcommittee on Claims? [59] A. It was.

Q. And what response did you get from the Army as to your claim?

A. They referred me to a Military Board and I appeared before them and told them the various items of damage, which included damage to our property that we owned in fee simple and also in-

(Testimony of Alfred Lester Marks.)

cluded items that would tend to restore the facilities that they had destroyed, and I didn't get—I finally got a reply, as I recall it, in which they told me that we had already been compensated for everything that we were entitled to, and I wrote back, inasmuch as we had not received, and I asked them where we had been compensated, and then they wrote back offering us \$190. But that claim differs from this in the manner that I have indicated.

Q. Is this the letter that you got from the Army telling you that they would pay you \$190?

A. It is.

Q. And enclosed a full release for you to sign?

A. Yes.

Mr. Anthony: We offer the letter in evidence, your Honor.

The Court: All right. Received in evidence.

The Clerk: Plaintiff's Exhibit F.

(Thereupon, the document above referred to was received in evidence as Plaintiff's Exhibit F.) [60]

The Court: Have you told the full substance of the letter?

Mr. Anthony: May I have it please. (Handed to Counsel.) The meat of the letter is:

“You were informed by letter of 7 January 1945 that a check of the records of this office failed to reveal information on which to base adequate reply to your inquiries. Accordingly a request was submitted to the Judge Advocate General, Army Service

(Testimony of Alfred Lester Marks.)

Forces, Washington, D. C., for more complete information.

“This office has received a copy of letter to you from the office of the Judge Advocate General setting forth the reasons for denying your claim except as to certain damages in the amount of \$190.00, which it is hoped satisfactorily answers your questions.

“Very truly yours,

“CARL E. RANTZOW,

“Lt. Colonel.”

You may cross-examine.

Oh, I have one other question.

Q. (By Mr. Anthony): Mr. Marks, you offered to pay the rent, the trustees offered to pay the rent to the Territory under this lease, did they not?

A. They did.

Q. And a tender of the rent was refused? [61]

A. It was.

Mr. Anthony: No further questions.

Cross-Examination

By Mr. Deuel:

Q. Mr. Marks, you have testified regarding the valuations of your cattle on the ranch area. That presupposes, undoubtedly, that you have a knowledge regarding those cattle; is that correct?

A. General knowledge, yes.

Q. Do you know the condition of the cattle and type of cattle, and so forth? A. Yes.

(Testimony of Alfred Lester Marks.)

Q. You have to have that to formulate your opinion of value. Will you please describe for us the type of cattle you had down there.

A. How much of a description do you want? They were——

Q. Well, the cattle that you had down there generally are referred to as scrub type cattle, are they not?

A. Not all of them. I would say that a good proportion of them were. There were some blooded whole Herefords. There were some blooded Angus. Mr. McCandless at various times had brought in good stock, but the majority of them were, I believe, what would be classed as scrub cattle, cross breeds.

Q. And you are speaking now of the area of which we [62] are speaking now? A. Yes.

Q. Generally speaking, the Makua and Kuaokala area up above? A. Yes.

Q. You are aware, are you not, and isn't it correct, that there was a considerable percentage of tuberculosis in the herd? A. No.

Q. You don't know that? A. No.

Q. What do you have to say regarding tuberculosis in the herd?

A. There was some, but I wouldn't say considerable.

Q. Would you say 15 or 20 per cent was too high? A. I think it would be.

Q. As manager of the ranch, which you say you were, are you not aware of the records that were

(Testimony of Alfred Lester Marks.)

kept and tests that were made at the time of marketing some of the cattle?

A. They examine them whenever they market them and they are rejected; those that are tubercular are sold for dog food, but the figure that I have given there represents my estimate of the value of those cattle in the condition that they were at the time.

Q. I understand that, Mr. Marks, but I am trying to [63] establish for the Court the actual condition of the cattle, so the Court can make up his mind ultimately as to the value of the cattle. Did you or did you not keep records of the results of these tests for tuberculosis?

A. No, we did not keep record.

Q. If I told you that the Territorial veterinarian, the Board of Agriculture and Forestry, tested the McCandless cattle from March, 1941, right through to a later test April 27, 1942, six different groups of cattle, totaling 284 head, and that there were found to be forty-six infected, would you say that was correct or not?

A. I have no reason to doubt it. I don't recall them doing that at the time, however.

Q. But you don't actually know how many were infected or not?

A. No. We were in the process at the time of cross-fencing Makua Valley, and as we cross-fenced them, why we would have them tested and confined to certain paddocks.

Q. Now, with regard to the fences that you had

(Testimony of Alfred Lester Marks.)

on the properties, I believe you testified, did you not, that the fences were all in good condition, that is, in stock proof condition?

A. Which fences do you have reference to?

Q. I should have said the fences between, first of all, the upper side of the Makua area, that is, the fence [64] between your Makua ranch and the forest reserve up there.

A. Those fences were in good condition.

Q. You are not aware of the fact that many cattle had been getting through there prior to the war?

A. Not at the time. Those fences had been repaired prior to the blitz and the fences in Makua Valley were in good condition.

The Court: The fences surrounding the forest reserve, were they your fences? Did you have to maintain them, or did the Forest or Agricultural Board keep up their forest reserve?

The Witness: My recollection of the terms of the lease was that we had to do that.

Q. (By Mr. Deuel): Mr. Marks——

Mr. Deuel: The provisions in the lease itself, your Honor, require the lessee to maintain fences along the borders of the forest reserve in both instances.

Q. (By Mr. Deuel): This is going back some time, Mr. Marks, but here is a letter dated the 21st of July, 1936, addressed to you. I would like you to identify that. A. Yes.

Mr. Anthony: What was it dated.

(Testimony of Alfred Lester Marks.)

The Witness: '36.

Mr. Deuel: That is the 21st day of July, 1936, a letter from the Commissioner of Public Lands, then L. M. [65] Whitehouse, to Mr. Marks.

Mr. Anthony: I object to the letter on the ground it is immaterial, something that happened in 1936, no validity or relevance to anything that happened in 1941.

The Court: I can't tell from anything that has been said so far.

The Witness: It has to do with fences.

Mr. Deuel: I am going to explain that, your Honor. This letter I am introducing for the purpose of showing the history of this matter, and I am going to introduce further evidence with my witnesses which will tie in right with it. This letter is to show that as far back as '36 that these fences along the border between the forest reserves and the lease area, this particular one refers to Lease 1740, which is the Makua area, had been in disrepair and were not stock proof; and it is for that purpose that I offer this in evidence.

Mr. Anthony: It is too remote, your Honor. I have a letter right here from the Board of Forestry and Agriculture. It says they inspected them in March, 1941, and found them in good repair.

Mr. Deuel: I will put on the witness from the Board of Agriculture and Forestry in that regard.

Mr. Anthony: Why would a 1936 inspection have any relevance as to how the fences were in 1941? [66]

(Testimony of Alfred Lester Marks.)

Mr. Deuel: It is my purpose to show that this condition had existed for a great number of years and to show negligence.

Mr. Anthony: That is not relevant.

The Court: I can't quite see, if they were brought into good repair and were in good repair at the time the Army entered, what the past record would have to do with it. It would be of no importance.

Mr. Deuel: May I have an exception to the ruling, your Honor.

The Court: Have you anything that shows what the condition was at or approximately near the time?

Mr. Deuel: I will by my direct evidence, your Honor.

The Court: All right.

Mr. Deuel: This will have the same ruling, no doubt, but here is a letter from Commissioner of Public Lands to Mr. McCandless, Attention Mr. Marks, dated June 24, 1936, at the same time.

The Witness: Yes.

Mr. Deuel: You identify that?

The Witness: Yes.

Mr. Deuel: I also offer this in evidence for the same purpose, your Honor.

The Court: Well, if it is of the same nature——[67]

Mr. Deuel: Same nature.

The Court: It is refused.

Mr. Deuel: May I have an exception to that.

The Court: On account of the date. It would be fourteen or fifteen years before.

(Testimony of Alfred Lester Marks.)

Q. (By Mr. Deuel): Going further with regard to the fences, in the lease area 1741, which is the one we refer to as Kuaokala, there is adjoining it the Kuaokala Forest Reserve. Is it not true, Mr. Marks, that at no time was there a fence along the boundary between the lease area and the Forest Reserve?

A. The fence between the leased area and the Kuaokala Forest Reserve, which terminates at the Mokuleia Forest Reserve, which is approximately where my hand is now, was not fenced.

Q. Just for clarification——

The Court: You mean——

The Witness: From here over (indicating) this area here was not fenced. This area (indicating) was fenced.

Q. (By Mr. Deuel): Then it was possible for the cattle that the McCandless Estate had in the Kuaokala area to also wander into the Kuaokala Forest Reserve area? A. That is correct.

Q. May I ask you whether you know, regarding the fence along, this would be the easterly end of the Kuaokala Forest Reserve, between that there and the Mokullia Forest Reserve, [68] do you know whose fence that was?

A. That fence was put in by the CCC people, I believe.

Q. Would you say it was incorrect if I told you that was a Territory fence?

A. That would be Territory. CCC had a camp up here. That was a Territorial activity conducted

(Testimony of Alfred Lester Marks.)

under the auspices, I believe, of the Board of Forestry and Agriculture.

Q. And you have stated there was a fence in existence between Kuaokala lease area 1741 and the property that Dillingham had, Kealia; is that correct? A. Yes.

Q. Do you know who put that fence in?

A. We had a gang working up there on that. It was a reconstruction job. There has always been——

Q. Do you deny that that fence was put in by Mr. Dillingham or his people?

A. If it was, it was a joint—I believe he put so many men on it and we put so many men on it. There is a joint fence and neither he nor we could be expected to do the whole thing.

Q. Mr. Marks, with regard to cattle that you had in the Kuaokala area, you had been operating a cattle ranch there for some years; is that correct?

A. That's correct.

Q. Disregarding the time after the war, in what manner [69] would you bring cattle down from there when you were taking them to market?

A. We would have—we would drive and catch them in a fence, in a corral there, then we would just have to drag them down. Occasionally we would take them across the Dillingham property, and occasionally down a trail that goes down almost on the boundary of Kealia and Kuaokala boundary.

Q. That operation of getting those cattle down from there was a rather expensive operation, was it not? A. Yes, it was.

(Testimony of Alfred Lester Marks.)

Q. And I believe you had quite a number of cattle up there, at least as many or more than you had in Makua?

A. I think less than in Makua. There were quite a few cattle up there, though.

Q. Fairly even, would you say?

A. Makua, the vegetation in Makua could support more cattle than Kuaokala could.

Q. Now, you stated that you never had made, or at least any time around this period, an actual cattle count; is that correct?

A. That is correct.

Q. You made the estimate of your numbers?

A. Yes.

Q. And I believe you stated a little while ago that your estimate would be 1200 head? [70]

A. As I recall, that was our estimate.

Q. You will recall testifying before the Congressional Claims Committee in 1945, do you not?

A. I do.

Q. If I told you that at that time you also stated that you had made an estimate and that your estimate was around a thousand head, do you recall that?

A. I wouldn't say that I didn't. As I recall, this 1200 head, wasn't it, that my testimony was the carrying capacity of it.

Q. That is what I want to clarify. In the Congressional Claims Committee hearing you testified you estimated around a thousand head and today I understood you to say 1200. It certainly couldn't have jumped two hundred at that time.

(Testimony of Alfred Lester Marks.)

A. In an estimate I think it could. My recollection is that I said the carrying capacity was around 1200, or was 1200, and I still think that a thousand head would represent the area of Makua, Kahana-haiki, and Kuaokala and Keawaula.

Q. Then you want the Court to consider your estimate as around a thousand?

A. For that area, yes.'

Q. And that is what this claim is based on?

A. I beg your pardon?

Q. Within the areas in which this claim is based? A. Yes. [71]

Q. That being merely an estimate, though, Mr. Marks, it is possible that it might vary somewhat one way or the other, is it not? A. I think so.

Q. It could be that you didn't have more than 900 head there?

A. No. No, I can't go that far with you. If I made a mistake, it was in the other direction; I have underestimated it.

Q. You did state that you had not made a complete count of the cattle, these cattle also, as you said, were free to range in the Kuaokala Forest Reserve; there were a number of cattle in that area, were there not?

A. You mean in that little—yes, in the unfenced portion of it.

Q. That is right.

A. Yes, there were some in there.

Q. So it is possible that you might have missed your estimate by quite a few?

(Testimony of Alfred Lester Marks.)

A. I think if I did I underestimated, though. I was rather careful to keep on the conservative side.

Q. You testified, Mr. Marks, on one or two occasions when you went up there after the war had broken out, that you saw a number of fences which had been cut.

A. Yes. [72]

Q. Were you there at any time, did you actually see any fences being cut, or was it a matter of seeing fences which you assumed had been cut?

A. I didn't see them actually cutting any fences.

Q. From your own knowledge you don't actually know whether the fences were cut or who cut them?

A. There were roads that the Military vehicles were using going hither and yon and we had no vehicles down there. The place was closed, practically, to outsiders, and the talks that I had with the people down there admitted that it was necessary to do so, and we couldn't argue against it.

Q. Now, with regard to the water supply, you testified that some of the water pipes had been cut and that one or two of the tanks either had been partially destroyed or turned over, or damage done to them. I gathered from that that you implied that the cattle were deprived of water supply.

A. That's right.

Q. Did you actually at any time see the troops depriving the cattle of the water supply?

A. Yes.

Q. Keeping them from it?

A. Yes.

Q. In what nature?

(Testimony of Alfred Lester Marks.)

A. Up on Kuaokala we had a water trough with a pipe running from a spring, and they actually cut this water trough [73] off and put their own cistern in there that took all of the water supply from this spring, and the cistern was used for both their domestic supply and the supplying of the pack trains that were used in bringing material up from the Kawaihapai side of the ridge.

Q. Is it not true in regard to that supply, however, that the cattle were allowed free access to this new supply that the Army personnel had there?

A. No.

Q. Allowed to use it along with the pack train?

A. No, they couldn't have gotten into that cistern if they wanted to. It was quite a high cistern. It actually shut the cattle off from that.

Q. How did the pack train get into it?

A. A pack train is under halter all the time and he is tied up at night, and they take the water to him.

Q. With regard, again, to your cattle valuation, that is based on previous marketing experience, is it?

A. Yes, that is among the items considered. Also the—Do you want me to elaborate on it?

Q. I would like to know how you arrived at it.

A. Also the fact that at the time the Inter-Island transportation was shut off. There were Japanese submarines around here at the time, if you recollect, and there was an impending short-

(Testimony of Alfred Lester Marks.)

age of beef. And all of those matters were [74] taken into consideration.

Q. But your cattle values were based upon cattle delivered for market; is that correct?

A. Not necessarily.

Q. What I am getting at is: If you were to sell those cattle, you wouldn't just sell them out in the field and let them come and get them and round them up?

A. Sometime you do, if another person has an area that has feed on it and you don't, he will come and buy so many head, so many hundred head. They call them store cattle.

Q. You think you could have sold the entire cattle you had out there at \$100 a head to somebody to come in and take them as they found them?

A. I think at that time they would have been glad to get them.

Q. Mr. Marks, do you recall that it was about 1943 when you first submitted a claim to the Army, maybe not the first time, but you did submit a written claim to the Army in 1943, at which time you claimed the loss of 369 head of cattle?

A. I believe so.

Q. Then that number at that time, 369 head, I presume was based on the same type of figuring that you now compute 366; in other words, that you estimated you had around a thousand head of cattle and deducted the number you had taken [75] from that; is that right?

A. No, we estimated—I went out with the fore-

(Testimony of Alfred Lester Marks.)

man and we estimated about how many head we left—we had to leave in each location.

Q. Don't you have to do that by estimating how many head you had to start with and deducting the number you caught from it?

A. Not necessarily. The figures ought to check somewhat.

Q. That is pretty big figuring, isn't it, to estimate the number of cattle still ranging around on a large area?

A. No, I don't think so. You see a group here and a group there, and we knew at the time that the area was being run over, you might say, by troops—there were troops all over the place, and the cattle in the daytime were down in among the trees in the gulches, and it was the best estimate that we could make at the time.

Q. Do you think that is a satisfactory way of estimating or arriving at the number lost, to take the over-all picture and deduct the number you caught; wouldn't that be more accurate?

A. I think either of them, in competent hands, would be a fairly good estimate of it.

Q. In any event, in 1943 you put in a claim for 369 head as being lost? [76] A. I think so.

Q. You recall in the Congressional Committee hearing that you stated that in 1944 and 1945 you caught an additional sixty-two head of cattle?

A. I don't recall making the statement, but that was a little closer to the time of actual operation

(Testimony of Alfred Lester Marks.)

than it is now, and if I said that, it is probably right.

The Court: When was that, Counsel?

Mr. Anthony: October 16, 1945, that hearing.

The Court: Well, what I meant was, when was the statement made that they later caught 62?

Mr. Anthony: October 16, 1945.

Mr. Deuel: You mean catching the 62 head additional?

The Court: Yes.

Mr. Deuel: That, your Honor, was made at this hearing in 1945 pertaining to a period in the year October, 1944, to October, 1945, "we caught 62 more head."

The Court: Well, between 1944 and 1945.

Q. (By Mr. Deuel): I am reading from the testimony, Mr. Marks. A. Yes.

Q. Therefore, on your own figures——

Mr. Anthony: What page are you reading from?

Mr. Deuel: Thirty six, just about the middle of the page. [77]

Q. (By Mr. Deuel): On your own figures, then, if you had lost 369 head in 1943 and later caught 62 head, that would reduce your losses by 62 from 369?

A. Not necessarily. I might have been 62 low in my other figures.

Q. As time goes on your original estimate gets higher and higher?

A. No, no. What page in the transcript is that, because I don't recall?

(Testimony of Alfred Lester Marks.)

Q. I can show it to you. It is at page 36, Mr. Marks, at about the center of the page.

(Witness examines document.)

Q. Coming to your pigs that you had up there, Mr. Marks, most of those pigs were pretty much of a roaming lot, weren't they, and practically the same thing as the wild pigs that you find around the country?

A. They were roaming, but I wouldn't class them as wild pigs.

Q. What manner of control did you exercise over those pigs?

A. We had a pig pen and they would come into it occasionally. The sows that were about to give birth were usually kept in the pig pen in the immediate vicinity of the house, and then after that they were allowed to roam over the pastures, and so forth. [78]

Q. Isn't it true that pigs ranging over a wide area and ranging up through the forest reserve and all become practically as wild as wild pigs?

A. I never thought so.

Q. Do you find you can just go out and catch them easily?

A. Yes, you can catch them as easily as you can any pigs. Pigs in general are not easy to catch.

Q. You have to round them up first, you have to get them into a pen? A. Yes.

Q. If they are ranging all over the country, that is quite a job?

(Testimony of Alfred Lester Marks.)

A. Sometimes it is hard to catch them in a pen, too, if you don't have the proper corners, and so forth.

Q. You actually had no way of counting all those pigs you had either, other than just making a general estimate? A. That's right.

The Court: Did you have any place where you fed them?

The Witness: They were fed right near Peter Andrews' house there.

The Court: What did you feed them?

The Witness: We fed them middling, particularly the sows that had the young ones, and then we kept some [79] pedigree boars there, too, imported stock, and those we fed, and the others would roam around and eat algaroba beans and roots and sweet potatoes and other things.

Q. As a general thing, most of these pigs lived off the ground out there?

A. No, I don't think that is——

The Court: They ranged clear up into the forest reserve?

The Witness: Yes, they did.

The Court: Do you have a pig license to go into the forest reserves and shoot them?

The Witness: We had the ingress and egress fairly well under control there, and occasionally they would go up and catch pigs, the wild pigs, the cowboys would go up into the forest reserve and get them, but there is a difference between your wild pigs and these others. Your wild pigs are

(Testimony of Alfred Lester Marks.)

taller and rangier, and these others, well, you might say, had an air of refinement about them. They had a little better lineology than the wild pigs would.

Q. (By Mr. Deuel): More aristocratic?

A. Yes.

Q. You stated that these pigs disappeared in various ways, I believe. A. Yes.

Q. Did you make an effort to do anything about getting [80] them in and taking care of them after the war had broken out? A. No.

Q. And what ways did you say these pigs disappeared?

A. A lot of them were eaten. All of the soldiers in the messes around there were bragging about what fine pork diet they had, and I think they were enjoying the roast pork. If you would go up to Kuaokala—on two occasions we saw some soldiers on the way down with a couple of live pigs, just little ones, on the way to make presents of them to some of their friends they had made acquaintances with.

Q. They had gone out and stolen pigs?

A. Up there they would entice them around the camp. They would leave their slop out and the pigs would walk out and eat it and they would grab them. Some of them had pet pigs up there.

Q. Had what?

A. Pet pigs, pigs that would come when they would whistle.

Q. Would you say quite a number of your pigs disappeared in that way?

(Testimony of Alfred Lester Marks.)

A. I think all of them did, unless there are some still there, which I don't know. There are hunters going up there now from—on both sides. There may be some of them still there for all I know.

The Court: You didn't recover any pigs? [81]

The Witness: No, we recovered no pigs.

The Court: During the time you were in sort of joint occupancy there after the blitz, did you do anything about your pigs?

The Witness: We—those around the main camp there, we moved down to Waimalu. We had the purebred boar and four or five of the sows we moved down to Waimalu, but out at Makua there we didn't have the facilities to take care of them any more.

Q. (By Mr. Deuel): May I refer you to Lease No. 1740, Mr. Marks, which provides for an annual rental of \$1410. Did you handle any of the payments for these leases so that you knew how much you were paying on that lease?

A. I didn't personally make any payments. Mr. McCandless handled that until his death in 1940, in August, and then I was administrator, or at least I was executor, and the Bishop Trust Company was administrator, and such matters as that, after his death, were automatically paid. There was no—

Q. Aren't you aware that from that lease in 1929 that an area of 8.84 acres was withdrawn by executive order?

A. I don't recall it.

The Court: How many acres?

(Testimony of Alfred Lester Marks.)

Mr. Deuel: 8.84 acres, your Honor, was withdrawn by executive order in 1929.

Q. (By Mr. Deuel): You don't recall that that was done [82] or know of anything about that?

A. No.

Q. And when you were Commissioner of Public Lands, you didn't have any occasion——

A. I didn't become Commissioner of Public Lands until 1943.

Q. I realize that, but in checking through the records for this claim, you weren't aware of the fact that that area had been cut down?

A. No.

Q. Now, you recall, Mr. Marks, in fact you mentioned something about it, the Army moved and built improvements for you, for the McCandless Estate, on the Ohikilolo property?

A. That is correct.

Q. In conjunction with the moving of the ranch? A. Yes.

Q. And you made a request for those improvements to be constructed or moved, did you not?

A. I did.

Q. I am going to mention these improvements to you. I want to see if you recall that one 16.8 by 30-foot demountable was built on the Ohikilolo property by the Army for you.

A. I wouldn't specifically know. There were a number [83] of those built, possibly five or six.

Q. If I told you there were closer to ten——

(Testimony of Alfred Lester Marks.)

A. It would be possible. I don't recall that number, though. Some of them the Army came and took over themselves right away, though.

Q. But they were put up for you on the Ohikilolo property?

A. But the Army did put some troops there. The Makua Valley was a combat range, and the personnel that was attendant to the combat range, and that were stationed there permanently were lodged in some of these quarters in Ohikilolo. That was a subsequent transaction, however.

Q. Those buildings and improvements——

The Court: Where is Ohikilolo?

Mr. Anthony: That is your fee simple land; is that right?

The Witness: Yes. This is Ohikilolo here (indicating). The Army replaced some of the homes in Makua on the beach here (indicating), and they built us some quarters, replaced some of the quarters on the fee simple land that they took here (indicating), but some of those quarters were almost immediately repossessed by the Army to house their own personnel who were the permanent personnel attached to this as a combat range.

Q. (By Mr. Deuel): Those buildings, though, were left [84] and still on the Ohikilolo property, are they not?

A. No, some of them were removed when the Army abandoned that camp. That camp had a name, and most of those camps had Mainland names that would be Camp Wisconsin or something

(Testimony of Alfred Lester Marks.)

of that kind, and that had a name that I can't recall, but that was in the area that was occupied, that is if I am talking about the same house that you are. However, those that are on the beach here that were built for the Hawaiian families in here——

Q. I am not actually talking about those. We are eliminating those from our consideration.

A. Yes.

Q. In addition to the buildings that were put up, the Army also constructed some fence for you; do you recall that?

A. I don't recall the fence. They put up some water tanks.

Mr. Anthony: I object to this unless it is confined to the land in question, your Honor. There was a condemnation proceeding brought against the land which the trustees owned in fee simple. That has been settled and has been paid for, and apparently these questions are directed to that, a matter in which final judgment has been entered; if it has to do with the lease in question, it is something different.

Mr. Deuel: If Counsel has objection to this, I am [85] willing to make Mr. Marks my witness for this purpose, your Honor. It has to do with the defense set-off that we have pleaded with regard to this matter of moving and the loss to them of their ranch, if it is allowed.

Mr. Anthony: I don't see the relevance of that at all, your Honor. There was a condemnation proceeding that has been settled.

(Testimony of Alfred Lester Marks.)

The Court: As I get it, more by inference than anything else, he is trying to show that the Army was trying to make good the seizure of that valley land there by their giving the tenants some other facilities on their own land.

Mr. Anthony: That is correct.

The Court: Well, that might be regarded as something that was paid on account, if it had any value, paid on account to the damage.

Mr. Anthony: Yes, but the difficulty with that is, your Honor, in a subsequent proceeding the value of those properties and the land was taken into consideration in arriving at a settlement with the United States. That money has been paid, and I think we are getting pretty far afield here.

The Court: That is true. I don't see where it is at all material in this case. It has all been thrashed out and considered in another proceeding for a condemnation fee.

Mr. Deuel: I agree, your Honor, that most of these [86] improvements are the ones for which these are to take the place had been on that fee land and that is part of my contention. The McCandless Estate, in settlement of that condemnation proceeding, was paid for the land and for the improvements. Now, in addition to that, the Army has built them a number of improvements, put up fences and water tanks, and so forth, on their fee land, after having paid them for the ones in conjunction——

Mr. Anthony: He has it twisted.

(Testimony of Alfred Lester Marks.)

The Court: Mr. Anthony says these things that the Army did for them were all taken into consideration in the condemnation proceeding.

Mr. Deuel: No, your Honor, that I disagree with. There was no consideration in that of the fact that new buildings had been put up for them. We paid them full value in that condemnation proceeding for the fee and the improvements.

Mr. Anthony: That is Counsel's statement.

The Court: As to the value of those buildings, I can't tell whether they were something that was built at the appeal or request of the McCandless Estate, which had been dispossessed, or something that was in the nature of some gratuity, and, as Mr. Marks testified, no matter why they built them, they came in and occupied them themselves.

Mr. Deuel: Mr. Marks just admitted that on behalf [87] of the McCandless Estate they had requested these improvements. I asked him that question a little bit ago.

The Court: I lost that.

Mr. Anthony: The point of the thing is, these buildings were put on a parcel of land which the United States Government condemned in fee simple.

The Court: They didn't condemn this section over here (indicating)?

The Witness: No. They were removed from parcels of land.

The Court: Removed from parcels of land. Did they have any new material?

(Testimony of Alfred Lester Marks.)

The Witness: In some of them.

Mr. Anthony: But ultimately the land was condemned. That is the point I am making. And there was a settlement.

Mr. Deuel: That isn't correct. I must have misled you in my statement.

Mr. Anthony: Go on. I will straighten them out in cross-examination.

Mr. Deuel: These improvements were located on their Ohikilolo property where they are still operating.

Mr. Anthony: Do you understand the question, Mr. Marks?

The Witness: May I have it repeated?

Mr. Deuel: I am asking you about the extent of the [88] improvements which the Army, after your request, placed upon the Ohikilolo McCandless property.

The Witness: I made a request that certain facilities be replaced in Ohikilolo. Most of those facilities, except the house and guest cottage, were on fee simple land in Makua.

Mr. Anthony: Belonging to whom?

The Witness: Belonging to L. L. McCandless. And those were placed on fee simple land in Ohikilolo, and in the settlement of the condemnation of the fee simple land in Makua, when I was requested to submit a figure that I would compromise on, I took that into consideration. The house, however, was not moved.

The Court: The old Frank Woods house?

(Testimony of Alfred Lester Marks.)

The Witness: The old Frank Woods house.

Q. (By Mr. Deuel): That was on the leasehold?

A. That was on the leasehold. We had had an agreement whereby there was to be an exchange of that house for a similar house in Kona, and it was a school teachers' cottage, and the school teachers had already moved in, but the papers had not gone through for this improvement on the leasehold at Makua, and that's why we wanted it moved, if possible.

The Court: The agreement was with the Territory?

The Witness: With the Territory. But that was why I asked for that house to be moved also, but it was not moved. [89]

Mr. Deuel: I have here, your Honor, a copy of the settlement that was made in Civil 485 and I ask your Honor, since it was in this court, to take judicial notice of the settlement there. There was no mention made of any deals for improvements. I believe the record will show the payment was for complete taking of the land, which would include the improvements.

The Court: Well, it was a compromise settlement out of court, wasn't it?

Mr. Anthony: That is right.

Mr. Deuel: It was settled by stipulation.

The Court: Mr. Marks says that in compiling his figure as to what remained to be paid by way of final, full settlement he took into consideration

(Testimony of Alfred Lester Marks.)

the fact that the Army had made available, or reconstructed, or transferred, some buildings on the land that was taken and rebuilt in other land that belonged to Mr. McCandless in fee, and he took that into account, so that that would be hidden, according to his testimony, now, in the figure that he submitted as one which he would be willing to settle for; is that correct?

The Witness: That is correct.

Mr. Deuel: That is merely their side of the story, then, your Honor.

The Court: Yes, true.

Mr. Deuel: The Government does not concede that [90] the settlement was made on that basis.

The Court: All right. The story as to what operated in Mr. Marks' mind in arriving at a figure will stand until it is overruled.

Q. (By Mr. Deuel): In that regard, Mr. Marks, I have before me a letter dated April 29, 1947, from you, as executor of the McCandless Estate, to the Real Estate Claims Officer, District Engineer, with regard to that question. Do you recall that letter? A. Yes.

Mr. Deuel: This letter pertains to that question as to whether or not the improvements were considered in that settlement or not, your Honor, and I offer it in evidence.

Mr. Anthony: The settlement wasn't made until six months ago. This is dated 1947.

Mr. Deuel: This letter, however, has a statement in it from Mr. Marks as to what would be contem-

(Testimony of Alfred Lester Marks.)

plated in the settlement and that the improvements would be considered in that settlement.

Mr. Anthony: This was two years before we even began to negotiate with Mr. Dolan.

The Court: Dolan was not here in 1947?

Mr. Deuel: Not in 1947, your Honor.

Mr. Anthony: Just last year Mr. Marks and I settled it with Mr. Dolan. [91]

Mr. Deuel: And myself, your Honor; I was in on the conferences.

The Court: What is it you have there? Something you want to put in?

Mr. Deuel: This letter, your Honor, I wish to submit as bearing on this point. It has to do with this claim in general, and one portion says:

“In further explanation, the remaining portion of the ranch consisting of approximately 165 acres of fee simple land——” That is the part we were just talking about settled in 485. “——is under condemnation by the federal government, and since it is the usual procedure to determine the value of improvements, etc., at the time of taking and allow interest on this amount up to the time of payment, it was not deemed proper to include these items in the claim as made.”

That is referring to the claim made to the Army and on which this claim now is based, intimating there the fact that the condition was to be paid for those improvements in this settlement which was made, and I submit it is proper to put in evidence.

The Court: All right, you offer it?

(Testimony of Alfred Lester Marks.)

Mr. Deuel: I offer it.

The Court: Accepted.

The Clerk: United States Exhibit No. 1. [92]

(Thereupon, the document above referred to was received in evidence as United States Exhibit No. 1.)

Q. (By Mr. Deuel): Mr. Marks, with regard to these improvements, do you recall in the Congressional hearing, again referring back to that, in 1945 having commented on those improvements?

A. Yes, I did.

Q. And at that time you stated that you have had some contracting experience, building experience, and that in your estimation, as you stated, in normal times you would do the building for one-half of the stated figure, which was one-half of 23 thousand something?

A. Yes.

Q. There you referred to normal times. At the time, being 1942, can you state how much higher your figure would have been?

A. You mean for the replacement of those?

Q. That is right.

A. I would have to get out the cost index on that and go into it. At the time I made that remark, it was rather a side issue that was commented upon by, I believe, one of the members of this committee of Congress.

Q. Your recollection is correct.

A. And inasmuch as we were not making a claim for the improvements, that is, the houses and

(Testimony of Alfred Lester Marks.)

water tanks, and so [93] forth, in our claim, I wasn't particularly careful about my answer to that. It was something to me that was outside the issue before the Committee there and was outside of what we are making a claim here for.

You see, when—the first claim that we went before this Army committee on contained all of the elements of damage that had been done to both the leasehold and the fee simple. That was before suit was filed on our fee simple land so that when it became—after suit was filed on our fee simple land and it became apparent that we were going to be paid for that under the condemnation of the fee simple, I dropped that from this claim that we are considering now, and the remark that I made then was just an off-hand remark in reply to his reference to something that I didn't consider germane to the issue under discussion.

The Court: You asked the Court to take notice of a settlement that was made for his fee land and improvements, did you not?

Mr. Deuel: Yes, I have a copy.

The Court: What settlement was it?

Mr. Deuel: I am sorry, your Honor?

The Court: What was the settlement?

Mr. Deuel: I have a copy here.

Mr. Anthony: Civil 485, \$65,000.

The Court: How many acres involved? [94]

The Witness: One hundred sixty-six.

The Court: Was there any division between improvements and land?

Mr. Deuel: Just a \$65,000 settlement. "That the

(Testimony of Alfred Lester Marks.)

fair market value and just compensation which should be paid for the taking of the full, free and unencumbered fee simple title to Parcels 2, 3, 4, 5, 6, 7, 11, 12, 13, 14, 15, 16, 18 and 19, as described in the petition of condemnation as amended and declaration of taking as amended filed herein, is the sum of \$65,000.00, and which sum includes any interest due * * *'' It does not break down the improvements from the land.

The Court: And the condemnation was filed when?

The Witness: '43.

Mr. Anthony: March, 1943.

The Court: But they had taken possession——

Mr. Anthony: March 23, 1943.

The Court: They had taken possession of everything in 1941, December of 1941?

Mr. Anthony: That's right.

The Court: And then the settlement was made when?

Mr. Deuel: This was filed, your Honor, July 1, 1949. This includes interest, your Honor.

The Court: I know, but there were about six years between the entry for condemnation and the time of the settlement.

Mr. Deuel: That is right, your Honor. There was, of course, a deposit made with the declaration of taking.

The Court: What deposit was made? [95]

Mr. Deuel: I would have to check the record, your Honor.

(Testimony of Alfred Lester Marks.)

The Court: It isn't important. No division there as to any improvements, just assessed the land at so much, which covered the improvements.

Mr. Anthony: The deposit, your Honor, was \$18,178.

Mr. Deuel: Mr. Marks just stated, your Honor, that they had withdrawn their claim from the improvements at the time of that previous hearing because of the fact that they were to be settled in connection with the condemnation of that land. I contend that having been settled there that any improvements placed on the Ohikilolo land are subject to set-off in favor of the United States in the event an award is made for the leasehold in this instance in connection with the ranch operations.

The Court: What was that? I don't follow that. Say it again.

Mr. Deuel: The Government in its answer, your Honor, is pleading a set-off for the value of these improvements placed by the Government on the McCandless fee owned Ohikilolo land where these improvements were placed, in the event an award is allowed the McCandless Estate for damages in conjunction with the occupation of the leasehold premises.

The Court: We haven't heard anything about the fee owned premises in the Plaintiff's case so far. I don't recall making any claim for payment on the leasehold.

Mr. Anthony: That is anticipatory. That is their [96] defense. I assume Counsel is going to

(Testimony of Alfred Lester Marks.)

put on their counter-claim at the conclusion of our case, but it is dragged in at the present time on cross-examination of Mr. Marks, so in that sense it is anticipatory of the defense.

The Court: Yes. I couldn't connect it.

Mr. Anthony: As far as we are concerned, that is not part of this case at all.

Mr. Deuel: I bring that in because Mr. Marks is on the stand now.

Q. (By Mr. Deuel): Mr. Marks, getting down to the cancellation of the leases in 1942, you received letters of cancellation, notices of cancellation from the Commissioner of Public Lands at that time. Did you or the McCandless Estate make any reply to those notices?

A. Not that I recall.

Q. You stated that you did make a tender of rent to the Territory.

A. That's correct.

Q. I show you a letter dated January 24, 1944, from the McCandless Estate, signed by the Bishop Trust Company and by you, addressed to yourself as Commissioner of Public Lands in the other capacity, and I ask you if you recall that?

A. Yes.

Q. This letter pertains to a tender of rent on these leases? [97]

A. Yes.

Q. And that was the 24th of January, 1944. It is true, is it not, that this was the first tender that you made after the notices of cancellation?

A. That's correct.

Mr. Anthony: No objection.

(Testimony of Alfred Lester Marks.)

The Court: Tender of what?

Mr. Anthony: Offer to pay the rent under the two leases.

The Court: Oh, yes.

The Clerk: Government's Exhibit No. 2.

(Thereupon, the document above referred to was received in evidence as U. S. Exhibit (No. 2.)

Q. (By Mr. Deuel): That first tender that we just referred to was over a year and a half, between a year and a half and two years after the notices of cancellation? A. Yes.

Q. With regard to your loss of cattle, Mr. Marks, do you recall making a statement before the Congressional Committee—I am referring to page 33 of the report regarding the loss of cattle, and you stated that “we recognized——” “We know some of them got into the slaughter house that we recognized as our bulls had been marketed by others.” A. Yes.

Q. Did you find very much of that? [98]

A. Well, we don't hang around the slaughter house all the time. I was just on a casual visit to the slaughter house, and, oh, I would say that on two or three occasions—I didn't personally see them. It was reported to me by my employees.

The Court: Well, had you instructed your employees to make an investigation of that?

The Witness: No, they were down in conjunction with slaughtering some of our own cattle.

(Testimony of Alfred Lester Marks.)

The Court: You didn't have your cattle branded?

The Witness: Some of them, but not all of them by any means.

Q. (By Mr. Deuel): Mr. Marks, have you ever received any reimbursement on this lease for rent paid, specifically referring to the Lease 1741, for the approximately last six months of the lease prior to the cancellation date?

A. Yes, I think there was a payment of six hundred and some dollars.

Q. If I told you that you before stated that to be \$671.63 for the period to December 29, 1942, that is correct, is it? A. Yes.

Q. You received that from the Army or from the Government?

A. We received that from the Army. That was brought [99] about by the fact that the Territorial Land Office had no facilities under which they could repay rent, refund rent, and so Mr. Whitehouse asked us to enter into a sub-lease for that period, and if you will read further——

The Court: Six months' period from June 29 to December 29, 1942?

The Witness: Yes.

The Court: And that was a half year's rent——

The Witness: That was a half year's rent.

The Court (Continuing): ——that you had already paid the Territory, and the Army paid it back?

(Testimony of Alfred Lester Marks.)

The Witness: The Army reimbursed us.

The Court: Did you pay the same rental on both of those tracts, both leases?

The Witness: I think there is a slightly different amount of rent there.

The Court: Well, I mean by the acre. There is a difference in acreage.

The Witness: I would have to check that up before making a reply on that.

The Court: Well, have you the leases here in court?

(Documents handed to witness.)

The Court: It would be in the beginning, wouldn't it?

The Witness: It usually is, but on Lease 1740 the [100] rent is \$1410 for 2275 acres, or approximately 62 cents an acre. On Lease 1741 the rent is 1290 for 2517 acres, or around 51 cents an acre.

The Court: Fifty-one cents an acre?

The Witness: Yes. Twelve ninety for 2517 acres.

The Court: Yes.

Q. (By Mr. Deuel): One more question with regard to your fencing, Mr. Marks. You stated that in the Makua area, that is, Lease 1740 area, that you had some cross-fencing in there. Is it not true that it was just about that time that you were in process of breaking that into paddocks and you were in process of constructing that cross-fencing?

A. No, we had completed those cross-fences.

(Testimony of Alfred Lester Marks.)

Q. Now, with regard to the cost of recovering your cattle, those that you caught and brought in, is it not true that had you gone in and rounded up all the cattle that you had just prior to December 7, that you would have had some expense in catching your cattle and moving them?

A. That is correct.

Q. And your expense would have been pretty much the same as it was in this instance that you testified to?

A. No, we would have had the fences to drive them along, which would have greatly facilitated catching them. As it was, with the fences down, where you start after them and they spread in all directions, it greatly increases your [101] problem of rounding them up. Had the fences been intact we would have been able to get them all out of Makua.

Q. You would have a considerable problem with those up in the plateau area, Lease 1741?

A. Yes.

Q. You have to bring them down the hill. That is an expensive proposition?

A. That was expensive.

The Court: You mean that the fences you had recently built were utterly demolished? As I got your explanation before, they had opened them to carry or haul stuff through.

The Witness: They had cut the wire and when you cut a wire, your whole fence collapses.

The Court: True enough, but when you stretch

(Testimony of Alfred Lester Marks.)

the wire back again, you have rehabilitated your fence to a large extent.

The Witness: Well, we couldn't rehabilitate it faster than they would drive through it with their tanks and vehicles.

The Court: For round-up purposes couldn't you do that? Your round-up would only last during the part of daylight for certain days.

The Witness: Well, to have done that would have been more expensive in our estimation than it was just to go [102] in and catch what we could, because there were emplacements built. There were lines of barbed wire built and all manner of military installations.

The Court: Well, do you figure that the cattle actually abandoned the land included in these leaseholds, ran into the forest reserve and were lost there, or just simply couldn't be found in the leasehold? What was the situation?

The Witness: In the Makua area there were still a number of cattle which we took off and which we put in the \$2-a-head to round them up, but those that we are making claim for were those that when we would try to round them off would run up into the forest area and we couldn't catch them.

The Court: Those bulls that your men identified as belonging to the Estate which found their way into slaughter houses, did you ever ascertain who brought them into the slaughter houses?

The Witness: Yes, they were caught over on the Dillingham property at Mokuleia. After the cattle

(Testimony of Alfred Lester Marks.)

got up into the Mokuleia Forest Reserve, the fences were also down on the other side and they would go out into the other area and be caught.

The Court: Largely what you lost Dillingham got the benefit of? [103]

The Witness: He did, and there were other people allowed up in here to catch them.

Mr. Anthony: Did you ever ask Dillingham for them?

The Witness: There was one group I did. We received a letter from the Board of Forestry telling us that some of our cattle were in the Mokuleia Forest Reserve and we went up and were driving some across to get them out on the Mokuleia side, and Mr. Dillingham had the cowboys arrested and they took the cattle. He seemed to think that they were his.

The Court: You got them back?

The Witness: No. Those were among the cattle that we had lost. I couldn't claim them from him.

The Court: How many were there?

The Witness: In that bunch there were about twenty, as I recall. I was not up there myself.

Q. (By Mr. Deuel): How many did you say, Mr. Marks? A. About twenty in that group.

The Court: You figured, I guess, that it is an ill wind that doesn't blow Dillingham some good.

Q. (By Mr. Deuel): Was there more than one occasion when cattle were lost in that way?

A. No, that was the only occasion. The Board of Forestry after that withdrew their request to us

(Testimony of Alfred Lester Marks.)

specifically to go up and get those cattle, so we didn't hear any more [104] about that particular phase of it, although we did know that there were people going up into the Kuaokala from the Kealia side and were catching the cattle.

The Court: Dillingham was willing to admit that his cattle ranged over in the Forest Reserve?

The Witness: Well, we didn't go into the details of it.

Q. (By Mr. Deuel): You state that there were quite a number of your cattle lost to other people, picking them up and putting them in with their herds and taking them to the slaughter house?

A. I think so, yes.

The Court: Well, Dillingham is the only neighbor bordering, that is, cattle raiser?

The Witness: He was the only cattle raiser. I think other people would go shooting up there. The current rumor was anyone who wanted meat would come up the Dillingham side, shoot a bullock and be allowed to take it.

The Court: Be allowed to take it out through Dillingham's property?

The Witness: Through the trail that goes down there. It was a well established trail going up over the land of Kealia, which was built by the CCC and was greatly improved by the Army and used by them.

The Court: Practically all that whole mountainous [105] country there was policed by the Army about that time, though, wasn't it?

(Testimony of Alfred Lester Marks.)

The Witness: Yes.

The Court: Wouldn't it have been very difficult for anyone to go out and slaughter beef?

The Witness: No, I don't think so. I don't think they had any objection to it.

Mr. Deuel: That is all the questions I have, your Honor.

The Court: Mr. Marks, relatively, as between the two leases, Makua was the better in cow feed, wasn't it?

The Witness: Yes. Yes, it was.

Examination

By the Court:

Q. Well, taking them upon the whole, about how many acres would you figure to maintain per head of cattle, that is, in rotation?

A. I would say that would average about five acres to a head.

Q. Five acres. Well, there is quite a lot of waste land in those two leaseholds?

A. There is more waste land on Kuaokala than there is in the Makua area.

Q. It is practically good only for goats?

A. Well, there were quite a few cattle up there.

Q. And did you have any regular seasonal round-ups for marketing purposes?

A. Not during my control over it. At Makua here, we had, as I testified, recently cut it up into four paddocks and make our fences tight, and we

(Testimony of Alfred Lester Marks.)

were having that so that we would have resting periods of the paddock. We had not carried our fencing program yet up onto Kuaokala.

Q. Will pasturage upon the whole lend itself to certain fattening seasons? A. Yes.

Q. Algaroba beans; you took advantage of that, didn't you?

A. We did, and this was also run in conjunction with the Ohikilolo area. That is on the Honolulu side next door and there was quite a bit of koa land in the upper regions of that.

Q. Koa. A. That is, haole koa.

Q. In the upper regions they would grow continuously green the year round?

A. Yes, it would.

Q. How long prior to the blitz day had you marketed any substantial amount of cattle?

A. Not, in any great numbers. We did send, oh, maybe two or three a week to market in certain seasons. [107]

Q. Well, what did you do? You just drove those, the nearest at hand, out of Makua?

A. Well, Makua and Ohikilolo. In the upper part of Ohikilolo you could pretty near always get fat cattle. That was the choice fattening land. As we would take them out of there, we would replace them from the other areas, and also have an occasional round-up and spot so many, fifty, and then keep them in a smaller enclosure so that they would be available as orders were received.

(Testimony of Alfred Lester Marks.)

Q. You sold through Hawaiian Meat?

A. We sold to Hawaiian Meat. We also sold some to Meat Market at Waipahu.

Q. You at one time maintained a slaughter house of your own?

A. We had a slaughter house of our own at Waimalu, which was in operation at the time and after the blitz.

Mr. Deuel: With the Court's permission, I have one further question.

The Court: Yes.

Cross-Examination

(Continued)

By Mr. Deuel:

Q. I just want to get straightened out—I think I understand, but regarding these paddocks that you put into Makua, as I understand it, Mr. Marks, and will you tell me if I am correct, you were putting in paddocks, you say, four of [108] them, quartering it, and you had a fence running, roughly, from the center by the sea towards the mountains, and then you had a cross-fence running, I guess, north and south across to quarter it, across the valley, is that it?

A. It wasn't quite a continuous fence. One of them was higher than the other, but you would notice that the Kahanahaiki area is shallower than the Makua, so that a line cutting them in half wouldn't necessarily—but there were two cross-

(Testimony of Alfred Lester Marks.)

fences that virtually cut the Makua and Kahana-haiki into four paddocks.

Q. You had a fence running from the sea towards the mountains?

A. It was not quite at sea. It was above these kulianas. There were kulianas just down above the road and at the back of these kulianas there is enclosures, small paddocks there, and the rear fence on those small paddocks and enclosures was the makai fence of these big lower pastures, and the forest reserve fence was the upper.

Q. Roughly, the Makua and Kahanahaiki area you had quartered into four? A. Yes.

Mr. Deuel: That is all, your Honor.

Mr. Anthony: I may have some questions on re-direct, your Honor, but I have a witness here who is from down the country. I think I can finish [109] him.

The Court: All right.

(Witness excused.)

JOHN K. NAIWI

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Just sit down, please.

Direct Examination

By Mr. Anthony:

Q. What is your name? A. John K. Nawi.

(Testimony of John K. Naiwi.)

Q. And where do you live, Mr. Naiwi?

A. I live at Ohikilolo, Waianae District.

Q. How old are you? A. Sixty-one.

Q. How long have you lived at Ohikilolo, Waianae? A. Ohikilolo about 25 years.

Q. Did you work for the late McCandless?

A. Not at this time. At one time I did.

Q. Did you ever work down at the ranch?

A. No.

Q. Did you live down there?

A. I lived right at the ranch.

Q. Where were you on December 7, 1941?

A. December 7 I was at home in Makua Valley.

Q. After the war broke out on December 7, did you see [110] the Army come down to Makua?

A. Well, there were two squads, and a couple of sergeants and one second lieutenant, the only Army we had down there on the 9th, arriving down in Makua on the 9th.

Q. December 9. A. On December 9 it was.

Q. Did they come down to the McCandless ranch?

A. Well, they came and they established their camp right outside of my house and lot.

Q. Where is your house and lot?

A. Well, it is on the left side of the graveyard at Makua, Makua proper, not on the Kahanahaiki side, on the Makua side.

Q. After that did more troops come down there?

A. Oh, yes, it took them almost six months before a full company was down at Makua to patrol the sea frontage.

(Testimony of John K. Naiwi.)

Q. Now, what did the troops do down there?

A. Well, they built up barbed wire fence and they patrolled the place, built up fox holes, and placed 75 mm. big guns, machine guns.

Q. Do you know what happened to the cattle on the McCandless ranch?

A. Well, the cattle were—after the Army moved in, the cattle were scattered all over the place.

Q. Did you see them? [111] A. Sure.

Q. Where did the cattle go to?

A. They go on the highway. The gates they removed, the gates on the highway, and of course the fence were cut. Who cut them, I don't know. I was block warden; naturally I see a lot of things that the other folks didn't see. That is, I go out patrolling sometimes with the guards to see that the Japanese put out their lights. And, of course, one night I saw the train come home, black-out with a little shaded green light, headlight, and all what I heard was a bang, collision. Well, after I went to see what it was; it was two horses that was killed at a bridge, cannot get across the bridge, so the engine came from Kahuku heading Honolulu way. That was at night.

Q. How did the horses get loose?

A. Well, there is a gate at the depot, Makua depot. Someone left the gate open. The next morning the gate was all open and the horses got into the railroad property.

The Court: You say this was a locomotive on a railroad track?

(Testimony of John K. Naiwi.)

The Witness: Yes, freight train.

Q. (By Mr. Anthony): There was not anybody around there except the troops wandering around, was there?

A. Well, the Military order that no one is supposed to be outside of your house after sunset and no one to walk [112] around during that time until the sun rises. I was there because I was block warden, and the Japanese don't quite understand English; you have to use a lot of pidgin language, you know, so I have to go and tell them to cut out their lights.

Q. Didn't you tell the haoles to cut out their lights?

A. There was no haoles there, only haoles were soldiers.

Q. Did you ever go up in the valley?

A. Sure.

Q. Makua Valley? A. Yes.

Q. Did you see the fences cut up there?

A. I didn't see——

Mr. Deuel: Objection until we see what period of time this is we are talking about.

Mr. Anthony: After the blitz.

A. I didn't see the wire cut up at the reservation, but the fences were all good.

Q. (By Mr. Anthony): Before the war?

A. Well, during the war. I had to show the Army the trail, see; the lieutenant came down, didn't know the trail, Dillingham trail, and in case the enemy

(Testimony of John K. Naiwi.)

landed in Makua, we would have a way to get out, so I had to get all my children and the soldiers would go up in the mountain; so naturally we came across the fence. The fences were all right at the time, the first two or three weeks. [113]

Q. What happened?

A. After that nobody go up the mountain. We stay right around where we are at Makua.

Q. Now, do you have any idea how many cattle were down there on the McCandless ranch?

A. Well, it was a big flock, I know, but I couldn't tell you how many exactly in number. To me it looked like eight hundred, six hundred, around that way. Quite a big flock.

Q. Did you ever see any pigs down there?

A. Oh, yes, plenty.

Q. What happened to these pigs?

A. Well, some of the pigs, some of the Army boys shoot them, and I help to eat with them. And they were tame pigs. Some of them you can scratch on the back and turn upside down and lay down.

Q. Did you ever see any cattle that were shot out there?

A. I didn't see any at Makua, but there were two cows were shot by the lieutenant. It was an accident. The jeep, the patrolling jeep, hit one cow on the front leg, breaking the front leg, and then hit the other one from the rear, so he came over to get me because I was warden.

Q. Because you were what?

(Testimony of John K. Naiwi.)

A. I was block warden, so he came over to my house in the middle of the night, around 10 o'clock, because the freight [114] train just came back, coming towards Honolulu from Kahuku, and I think the cattle get frightened so got in head of the jeep, I think, so the lieutenant hit them.

The lieutenant asked me what I thought. I said, "To leave the cattle like this is pretty cruel." So he said, "I will shoot them." So all pau.

Q. Where was this, on the highway?

A. On the highway next to my house.

Q. Do you know whether or not the——

The Court: Weren't they dressed?

The Witness: Beg pardon?

The Court: Weren't they dressed? Didn't anyone skin them and butcher them?

The Witness: No, they killed them, and the next morning I went there and hide one—you know, clean them up, and the Japanese who work for the ranch came and took the other, so we share and share alike; everybody have a piece. The Army didn't want them, so we went over there and get them.

The Court: Pretty scrawny cattle, or what?

The Witness: Fat. Good meat.

Q. (By Mr. Anthony): Did you get some yourself?

A. Oh, yes, I got a hind quarter.

Q. You got what, a hind quarter?

A. Hind quarter.

(Testimony of John K. Naiwi.)

Q. Did you have any occasion to notice any pigs that were [115] killed or sold down there, McCandless' pigs?

A. I have seen soldiers come back with a pig, and I have seen them carry pigs to trade. You can get a big pig for \$10.

Q. They would sell a pig for \$10?

A. Sure.

Q. What kind of pigs were they? Were they wild pigs?

A. Wild pigs from Ohikilolo up in the mountains, but the other ones down in Makua, that is tame ones. You see, the soldiers' camp is right back of my house, so naturally I get some slop from them. I was raising pigs, too, and I get a share of the pig from them.

Mr. Anthony: No further questions.

Cross-Examination

By Mr. Deuel:

Q. Mr. Naiwi, I believe you said that right after the 7th of December, about two squads of troops came down there.

A. On the 9th two squad, that would be about sixteen men and about four sergeants and one second lieutenant. And they didn't have a machine gun at that time. They brought a tripod, just the footing of the machine gun and stood in the church yard for two months before the gun came, so it was just the tripod alone, that is all, but no gun.

(Testimony of John K. Naiwi.)

Q. These troops were barricading the beach and occupying that [116] area? A. Yes.

Q. And you said it was quite some time later before a number of troops came? A. Yes.

Q. About six months? A. About that.

Q. You mentioned, I believe, two horses you said were killed on the railroad right-of-way, the train hit them? A. Yes.

Q. You have lived down there a number of years, haven't you? A. Yes.

Q. Isn't it true that there have been times in the past, I mean before the war, when some of the animals would get onto the right-of-way?

A. Oh, yes, sure.

Q. It happened occasionally?

A. Sometimes it happens, but this time, you see, the only person that walks out at night is the soldier and I the only civilian, so it couldn't be anybody else.

Q. With regard to the number of cattle that were down there, you say there was a large number; so far as you are concerned, you never made any count of them?

A. No, just when they are driving around. [117]

Q. When you get up to three, four, or five hundred cattle, that is quite a lot? A. Oh, yes.

Q. So you could miss your guess; you might say 400, 600, seeing them in a bunch; you wouldn't know the difference, would you?

A. It was a big flock.

(Testimony of John K. Naiwi.)

Q. These pigs you saw around there, they were mostly just ranging all over the valley; is that correct?

A. They roam around the ranch, but they have a regular piggery where they feed the pigs middling over to Peter Andrews' house lot, and they have a big bell that they ring and they all come back.

Q. There again, with regard to the pigs, you don't actually know how many there were; you **have** never counted the pigs? A. No.

Q. You just know there were quite a few of them? A. Oh, plenty.

The Court: Well, these wild pigs up in the forest, they had been there ever since you were a young fellow, hadn't they?

The Witness: Yes, different kind. The old kind of stuff there is a Poland China, long nose, and McCandless have the other white band. [118]

The Court: Berkshires?

The Witness: The heavy set pig, but the other is the kind Hawaiians use for luaus. Those are long nose; you know them when you see them.

The Court: Well, Poland China doesn't have a long nose.

Mr. Deuel: That is all.

Redirect Examination

By Mr. Anthony:

Q. You testified that there were six or eight hundred cattle, you thought, in Makua. How about in

(Testimony of John K. Naiwi.)

the other parts of the McCandless ranch, did they have cattle in the other places there?

A. Well, they have cattle at Keawaula and Kuaokala, but Kuaokala quite rugged up there.

Q. You don't know how many were up at those other places? . A. No.

Mr. Deuel: Actually, you don't know whether there were six or eight hundred in Makua?

The Witness: No.

Mr. Deuel: There was a large number?

The Witness: Large number.

The Court: How much rainfall out there a [119] year, in inches?

The Witness: I don't know, but we surely have heavy rains.

The Court: Do they have a rain gauge?

The Witness: At Koolau Mountains.

The Court: But down in the valley they don't have any rain gauge?

The Witness: No, not down there.

The Court: Nobody kept track?

The Witness: No.

The Court: Gets pretty dry out there sometimes?

The Witness: Only during summer, around August, but otherwise we have showers right along, maybe one or two showers a month. We are having plenty this time.

The Court: Is that all?

Mr. Anthony: No further questions.

(Witness excused.)

Mr. Anthony: I have one more witness. I don't have him here. I will have him here in the morning. We will be ready to close then inside of an hour.

The Court: All right. Well, do you think we can get through tomorrow?

Mr. Deuel: I have several witnesses, your Honor; I don't think so. I was anticipating the fact that Mr. Anthony was going to take a little more time on his case. [120] Also, I want, at the conclusion of his evidence, a motion to dismiss Paragraph 3 of the Complaint, and I think we should have an argument on that.

I will have this one witness that I spoke of tomorrow morning. Mr. Anthony agreed we could put him on at ten, I believe, so I would just like to know whether you would like to have the other witnesses here tomorrow. In fact, I will have a second witness here in case it is necessary.

Mr. Anthony: I was hoping we would get finished up tomorrow. You don't think so?

Mr. Deuel: It will take some little time on this argument.

Mr. Anthony: Couldn't we take the evidence and have the argument at the conclusion of the case?

Mr. Deuel: I would like to avoid the necessity of putting on my expert witness, if possible.

The Court: There is not any reasonable doubt but what we can finish this case by Thursday noon?

Mr. Deuel: I have six or seven witnesses, your Honor. It will depend a lot on how long our argument on this motion takes tomorrow.

(Testimony of Kendell J. Fielder.)

The Court: Your witnesses won't take long individually, will they?

Mr. Deuel: No.

The Court: Is there much to go over with [121] them?

Mr. Deuel: I think probably we should be able to finish sometime on Thursday.

Mr. Anthony: Doesn't your Honor have an argument in the Matson case on Thursday afternoon?

The Court: I have two arguments on Thursday afternoon, and between the two of them they will take a big half-day, so that I have just about got to have Thursday afternoon for other things. Well, all right, we will do the best we can.

(Thereupon, at 3:55 p.m. an adjournment was taken to February 15, 1950, at 10:00 a.m.)

Honolulu, T. H.

February 15, 1950

The Clerk: Civil No. 886, A. Lester Marks and Bishop Trust Company, Limited, Executor, Administrator C.T.A., and Trustee of the Estate of L. L. McCandless, Deceased, Plaintiffs, vs. United States of America, Defendant. For further trial.

Mr. Deuel: In accordance with the understanding of Counsel and permission of the Court, I propose to call Colonel Fielder to the stand out of order at this time, your Honor.

Mr. Anthony: No objection.

Mr. Deuel: Take the stand.

KENDELL J. FIELDER

called as a witness out of order on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Just sit down, please.

Direct Examination

By Mr. Deuel:

Q. Will you please state your name, age, occupation, residence and citizenship.

A. Kendell J. Fielder; occupation, Army officer; age, 56.

Q. Residence? [123]

A. Citizenship, American; residence, Ft. Shafter, Hawaii.

Q. With regard to your occupation, Colonel, will you please give us a brief bibliography or history of your service and experience.

A. I graduated from college and entered the Army as a second lieutenant in 1917. I have been in the Army as a commissioned officer continuously since that date, rising through the ranks to Brigadier General and back to Colonel at the end of the second war.

I served in France in 1917 in command of a machine gun unit for about one year. Between World War I and World War II, I served at various stations, mostly in command of infantry troops. Three years I was in the Philippines in command of a company, two years at Ft. Meade, Maryland, in command of a battalion.

(Testimony of Kendell J. Fielder.)

During this time I went to several of the Army schools, one of which was the advanced course for infantry officers at Ft. Benning, Georgia; another for the command—at Ft. Leavenworth, which is known as the command and general staff school.

I came to Hawaii for duty in November of 1938 and served here continuously until 1946.

That, briefly, is an outline of my service.

Q. Then on December 7 you were stationed [124] where?

A. I was stationed at Ft. Shafter on the staff of General Short.

Q. At that time what were your duties, Colonel?

A. I was in charge of military intelligence for the Hawaiian Islands, both counter intelligence and combat intelligence.

Q. Had you been so assigned for a time prior to that?

A. I had been so assigned since June of 1941. Prior to that I was executive officer of one of the brigades stationed at Schofield Barracks.

Q. And immediately following December 7, 1941, and for the next several months what were your duties?

A. I continued on duty as G-2, which means the officer in charge of military intelligence.

Q. In connection with your duties during this period of time, that is, the time of the attack and for the next several months, up until, we will say, the battle of Midway, were you familiar with the

(Testimony of Kendell J. Fielder.)

general situation on the Island of Oahu from the military standpoint? A. Yes, I was.

Q. And were you familiar with the general activities on Oahu during that period, particularly as they affected the military situation?

A. Yes, I was. I was probably more familiar with it than any other officer, because that was part of my duties. [125]

Q. Will you tell us what the activities were.

A. Well, the military activities after the attack on December 7 consisted primarily of the preparation for possible invasion, although the top military people—they didn't know whether the Japanese would attempt to land or not. The ground forces defending this island, in particular, had to be prepared. Consequently, most of the time was spent in stringing barbed wire and in placing artillery pieces, machine guns, mortars, 37 mm. guns, and light weapons and equipment for the defense of the beaches in the event of a landing of the Japanese.

Q. What was the general anticipation, particularly in so far as the military was concerned, with regard to possible invasion.

A. They thought it was possible that raids might be attempted by the Japanese, to say the least. An all-out invasion to capture the islands seemed not too probable, but possible. After all, the Military didn't think that the Japs would attack the place in the first place, so they felt that there was always a threat of an attempted invasion.

(Testimony of Kendell J. Fielder.)

Q. Was there a general anticipation of some attack or invasion?

A. There was definitely anticipation of raids, agents being landed from submarines, air tights, and the like.

Q. Was there any activity of that type after the attack [126] on Pearl Harbor?

A. There was one case where a lone Japanese plane flew from the Marshall Islands, refueled at Midway—not Midway, at French Frigate Shoals from a submarine, flew all over the island of Oahu and dropped bombs on the fifth of March, 1942. The bombs landed up back of Tantalus, and didn't do any damage, luckily.

Q. I refer you to an exhibit, Exhibit 1, showing the Kaena Point end of the Island.

The Clerk: That is Exhibit A.

Q. (By Mr. Deuel): It has already been brought forth that the lands involved in this suit are as outlined in blue on this map and designated by numbers here as Lease No. 1741 and Lease No. 1740. Were you at that time familiar with the general activities in those areas?

A. Yes, I was. In general, the two infantry divisions, the 24th and the 25th, were engaged in beach defenses, so-called. They had highly strategic mobile reserves around Schofield Barracks and other places and small units dispersed on the beaches. A great deal of barbed wire was put up, many machine guns were installed, particularly on the west shore of

(Testimony of Kendell J. Fielder.)

the Island, which had the best landing beaches. The best landing beach on the Island is down at Pokai Bay, which is several miles south of the area we are discussing. But all up that west coast it was necessary to place defensive guns, [127] to lay down interlocking bands of fire in the event of raids, and all-and-all out attack by the Japanese.

Q. These barbed wire entanglements you spoke of, you mean those were placed along the beach area?

A. Along the beaches in general and at certain strategic bottlenecks like down here at Maili, which is near Nanakuli. That was one of the key points. Another one is up at Kaena Point. Of course, there was no road around there, but it was possible if they landed at Makua it might be possible to work their way around, or even across the mountains, so consequently most of the landing beaches were pretty heavily covered with machine gun protection.

Q. With respect to the beaches in the Makua area, were there very many troops available?

A. No, because that was more or less the end of the line. As I say, they couldn't get around here. The big worry on this side of the island was Pokai Bay at Waianae and down at Maili Beach at Nanakuli. This was more or less the end of the line, and the road didn't go much beyond—I don't know how far, but not much beyond Makua Valley; so we didn't worry too much, yet there was a little stretch of beach there where agents and small raiding parties might have landed.

(Testimony of Kendell J. Fielder.)

Q. You mentioned something in the nature of artillery or defense pieces. What was the nature of those?

A. We had a great many batteries, both anti-aircraft artillery [128] and mobile light field artillery. They were placed all over the island, as a matter of fact, and if I remember correctly, some of those units were placed up in here (indicating); I don't know just where.

Q. You are pointing now to an area labeled on the map as Kuaokala Forest Reserve and Mokuleia?

A. Mokuleia, that general area, the idea being that they could shoot both to the north and to the west, from certain positions up there they could cover Makua Beach and possibly Mokuleia Beach, which is up on the north shore.

Q. What was the type of that artillery? Were they small or large pieces?

A. The largest we had early in the war were 75 mm. Later on they got 240 howitzers, but I don't believe they put them in that area.

Q. I believe you stated the purpose of that activity at Makua and Kuaokala, the two areas shown there, was for the purpose of defending the beaches?

A. Defending the beaches. In the event of invasion the invading force is most vulnerable when they hit the beaches. If they get a foothold and can get their support and weapons ashore, they are on almost an equal footing with a defending troop, but if you can catch them at the beach, if you can slow them up as they actually hit the sand, they are very

(Testimony of Kendell J. Fielder.)

vulnerable, and up to this time there had never [129] been a landing on a hostile shore that was defended, so we felt we could repel any landing effort if the beaches were well defended.

Q. Colonel, from your training and experience in military matters do you understand the term "combat activities"? A. Yes, I do.

Q. These activities that took place in this area that we designated on the map there, the area outlined in blue, in your opinion, from your experience, were the activities that took place there in the early days of the war, speaking up to the battle of Midway, combat activities?

Mr. Anthony: I object to that, if the Court please. I don't know whether your Honor gathers the purport of the question. The effort is to have the witness substitute his opinion for that of the Court as to what is "combat activities" within the meaning of the Private Act of Congress. The Private Act of Congress authorizes this Court to entertain jurisdiction of this case. Then there is a proviso which reads as follows: "That judgment shall not be rendered against the United States with respect to any part of the alleged damages for the loss of personal property, including livestock, which arose out of the combat activities of military personnel of the United States."

That is a question of law for this Court. We can have what the facts are. Obviously, I think, the purpose of that [130] certainly, one of the purposes.

(Testimony of Kendell J. Fielder.)

was not to have a duplication of the claims. That would be compensable under the war damage statute. In other words, the bombing, actual battle damage, was compensable under a different statute, not under this Private law. This is not a question of expert evidence.

Mr. Deuel: Your Honor, I construe the term "combat activities" to involve a mixed question of law and fact, and it is not intended that the witness shall substitute his opinion for that of the Court, but he is an expert and has been qualified as an expert in military matters of long experience, and his opinion as such expert in this line is to be brought forth, not to be substituted for your Honor's determination, but to assist your Honor in this matter, and I submit that his opinion is proper in evidence.

The Court: I will hear his opinion.

Mr. Deuel: Did you get the question?

The Witness: Yes, I have the question. It is very difficult even for a military man to define combat, but in a general sense everything that took place on this island shortly after the attack on December 7 involved combat. We construe our overseas tours of duty, for instance—if we are in a combat zone, although there might not be a shot fired, we get credit for combat service. So I would say that it certainly approaches a combat situation, although categorically it is a difficult question to [131 answer.

Mr. Deuel: That is all the questions.

Mr. Anthony: No questions.

(Witness excused.)

Mr. Anthony: Mr. Marks, will you resume the stand?

ALFRED LESTER MARKS

resumed the stand and testified further as follows:

Redirect Examination

By Mr. Anthony:

Q. You have already been sworn, have you not, Mr. Marks? A. I have.

Q. Yesterday you were asked by Mr. Deuel in regard to some 62 cattle which you testified were caught subsequent to the making of your report to the Army. Do you recall that? A. Yes.

Q. Over how long a period did that operation take place, Mr. Marks?

A. Over a year. My statement contained was that I believe from August, 1944, to August, '45, or October, that during that period we had caught 62 head.

Q. Now, in making your claim, you did not subtract the 62 head? A. I did not.

Q. Will you explain that, Mr. Marks.

A. Well, the cost of catching those was quite high and [132] I did not add the cost in either. Many times the cowboys would go over there and catch nothing, and we didn't add that cost to it, and we didn't add the cost when we actually did catch them, so the cost of catching those cattle and

(Testimony of Alfred Lester Marks.)

the salvage—the net salvage figure from catching them was rather an indeterminate factor. However, I felt that I wanted to bring out all of the facts, and also I was cognizant of the fact that I thought that my estimate of the number that we lost was on the very conservative side.

Q. Your estimate of the number doesn't purport to be a mathematical estimate or statement of the number of cattle that were actually lost?

A. No, it is not. It was our best estimate at the time, using all of the facilities that we had to make an estimate with.

Q. And you are still of the opinion that the figures that you gave on your direct examination is your best estimate of the number of cattle that were lost as a result of these activities?

A. I do.

Mr. Anthony: No further questions.

Recross-Examination

By Mr. Deuel:

Q. It is still a fact, is it not, Mr. Marks, that you did, in 1943, submit a sworn claim to the Army that you [133] had lost 369 head of cattle?

A. Yes.

Q. And you did, in fact, as you just said, recover——

Mr. Anthony: Sixty-six, I think it was.

Q. (By Mr. Deuel): In 1943; you did in fact subsequently recover 62 head? A. Yes.

(Testimony of Alfred Lester Marks.)

Q. It is your feeling, though, that any cattle you recovered, if you had recovered one hundred head, you still wouldn't have deducted them, any cattle you recovered later; is that what you mean?

A. One hundred head, I might have deducted some of those, but the 62 the cost involved plus the conservative character of my original estimate, I thought I had better stand on that.

Q. In other words——

A. I am revealing it, however, in the case, and if the Court decides there is value there, I am quite sure that they would deduct it. I am not hiding anything in that respect.

Mr. Deuel: That is all.

Mr. Anthony: No further questions.

The Court: Mr. Marks, you are leaving the entire matter—not the entire matter, but the number of cattle, at least, and other livestock, as really a matter of guess-work, to a large extent to the Court? [134]

The Witness: Not exactly guess-work, your Honor. After we got the cattle out, I got hold of the foreman and we made an estimate of how many cattle were still uncollected at the various places.

The Court: The Court's guess-work comes from the basis of the value of your estimates. Now, tell me how many head of cattle did you market in the year 1941?

The Witness: I would have to look into the record for that.

The Court: Well, you haven't the records here?

(Testimony of Alfred Lester Marks.)

The Witness: Not those particular records. They were marketed at different places.

The Court: Yes, but your bookkeeping and accounting would show how many cattle you had.

The Witness: Those will show—the Bishop Trust Company had the accounting at the time, and those will show in the monthly statements.

The Court: You had something to do with the ranch there for a number of years; how many head did you dispose of in 1940?

The Witness: Up to the latter part of 1940 Mr. McCandless handled all that. Mr. McCandless passed away in October, 1940.

The Court: He had carefully kept accounts of the operations of his ranches, no doubt. In 1939 do you have any [135] idea how many head of cattle you disposed of?

The Witness: When Mr. McCandless was alive, he handled that entirely. These ranches were his playthings.

The Court: Now, in 1941 do you know how many hogs you disposed of, for market and other purposes?

The Witness: I don't believe that many of the hogs—the hogs, a few were marketed, but most of them went to luaus and donations and political luaus and church luaus, and occasionally they would send a few to market, but not very often.

The Court: How many horses did you have down there?

The Witness: I would have to check that.

(Testimony of Alfred Lester Marks.)

The Court: Well, you only lost two?

The Witness: We only lost two.

The Court: Those were the two that got killed?

The Witness: That were hit by the railroad, yes, sir.

The Court: And who fixed the market value?

The Witness: For the horses?

The Court: Yes.

The Witness: I did.

The Court: Was that fixed as a market value or as just some sentimental value in connection with these horses?

The Witness: No, \$125 is the price that one pays for a riding horse. [136]

The Court: Did you ever have any horses killed by the railroad before?

The Witness: There had been many years prior to that. There was an obligation on the part of the railroad to keep their railroad right-of-way fenced.

The Court: And these war efforts had broken down their fence as well as yours?

The Witness: Yes, they had crossed right over the railroad track in places in going from one portion of our property to another and had gone right through the fences. They took no care at all in closing the gates, and it was a constant source of annoyance, but there was nothing we could do about it.

The Court: Well, after you made every reasonable effort to drive the cattle out, did you do any-

(Testimony of Alfred Lester Marks.)

thing by way of killing for slaughter the wild ones that just wouldn't be driven out?

The Witness: No, we did not.

The Court: That escaped in the woodside hills?

The Witness: The Army had taken possession by that time.

The Court: After the Army took possession, were you excluded from coming onto the land to recover any property there?

The Witness: They immediately began using the area [137] in Makua and through there as a combat range, dropping bombs and firing with live ammunition with boats at sea.

The Court: Yes.

The Witness: And I wouldn't let the cowboys go in there. In fact, I won't let them go in now. I have no desire to have one of them blown up by stepping on a dud and assume the responsibility for it.

The Court: Well, how much time did you have to get your livestock out of there?

The Witness: The letter, as I recall, gave us about a month, but it took a longer period than that, and actually we had a longer period, due to the fact that the replacements that they were making of some of the facilities on the fee simple property were not completed in time to move over there. We were not out completely, my recollection is, until about November.

Mr. Anthony: 1942?

The Witness: 1942.

(Testimony of Alfred Lester Marks.)

The Court: Is there any trail outlet from the valley up through the forest reserve and over the ridge there?

The Witness: There was one created there, going from Makua in a northerly direction up onto Kuao-kala. It was widened and opened up as a means of exit for the troops in there in case they had used up all of their ammunition and a landing had been made in spite of their best efforts. [138]

The Court: Before the troops made any trails there, was there an ancient trail?

The Witness: There was an ancient foot trail that went up this valley that I point to. It was not—it was a dangerous trail, and I wouldn't let my family take it on horseback.

The Court: Weren't there any trails up over this——

The Witness: No, that is quite precipitous going up in back of the valley.

The Court: Or through here anywhere (indicating)?

The Witness: No.

The Court: So that the only upper outlet out of the valley went over the ridge in here somewhere?

The Witness: That is correct.

The Court: Practically every valley that I know has some outlet,——

The Witness: The most traversed trail——

The Court (Continuing): ——up the streams as far as they run, but generally over the hills and out.

(Testimony of Alfred Lester Marks.)

The Witness: There was a trail going from Keawaula going up to the Kuaokala area. I believe it is shown on this map. Yes, here it is (indicating). That was the most frequently traversed trail.

The Court: All right.

Mr. Deuel: I have another question regarding the [139] pigs. Mr. Marks, I would like to have a little more definite description of these pigs that you had there. Am I correct that they ranged all the way from new born pigs up to the sows and boars?

The Witness: I would say so, yes.

Mr. Deuel: Of that number a great number of them were small pigs, though?

The Witness; Not an undue proportion, I don't think. They were pigs of all sizes.

Mr. Deuel: Have you any idea as to what the average weight of them would be?

The Witness: Oh, I would say maybe fifty pounds.

Mr. Deuel: That is all.

Mr. Anthony: No further questions.

(Witness excused.)

Mr. Anthony: Your Honor, could we have a short recess while I telephone a witness. I expected him to be here.

The Court: Yes.

(Recess had.)

Mr. Anthony: Mr. Clarke, will you take the witness stand, please.

JOHN K. CLARKE

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows: [140]

The Clerk: Just sit down, please.

Direct Examination

By Mr. Anthony:

Q. Your, name, please.

A. John K. Clarke.

Q. Mr. Clarke, you were born in Hawaii, were you? A. I was.

Q. You are a little bit out of breath, so I will take it easy. A. I will catch it.

Q. And you have lived here all your life, have you? A. I have.

Q. Have you ever had anything to do with the ranching business, Mr. Clarke?

A. Yes, I joined a firm of Hind-Rolph and Company in 1900 and from then on I was connected with cattle ranching.

Q. You have had something to do with the Puuwaawaa Ranch on the Island of Hawaii?

A. I have.

Q. That was the ranch formerly operated by the late Senator Hind? A. That is correct.

Q. And you are one of the trustees of the estate of James Campbell? A. I am. [141]

Q. And of the estate of Bernice Pauahi Bishop?

(Testimony of John K. Clarke.)

A. I am.

Q. Those estates both have large areas of land, some of which is leased for ranching purposes?

A. That is correct.

Q. And part of your duties, both as a rancher and as an owner and trustee, have been to ascertain the rental value of ranch properties?

A. That is correct.

Q. Are you familiar with the Frank Woods' land in the Waianae District ranch?

A. Yes, the lease was held by Mr. McCandless, and lately they took over again after Mr. Woods let go of the area.

Q. Are you familiar with that land?

A. I am. I used to go hunting down there as a boy.

Q. Did you make any visits to that land after Mr. McCandless took it over?

A. After his death.

Q. After his death? A. That's right.

Q. The Bishop Trust Company—you are an officer of the Bishop Trust Company, are you not?

A. I am.

Q. And the Bishop Trust Company was administrator of the estate of L. L. McCandless? [142]

A. That is correct.

Q. Did you make any recommendations after the death of Mr. McCandless as to ranch operations?

A. Yes, we rode over the area and I recommended that—the area at that time was in just one large block. I recommended that they cut it up

(Testimony of John K. Clarke.)

into four paddocks. That was a commencement; then see what occurred, and we would decide later if additional fencing was necessary.

Q. How many head of cattle could be carried on Leases Nos. 1740 and 1741?

A. I judge about twelve hundred acres—twelve hundred head.

Q. Do you have an opinion as to the fair rental value of that land as of 1942, July, 1942, when the leases in this case were alleged to have been cancelled?

A. I believe there would be no difficulty in leasing that land at \$3 an acre.

Q. You think that would be a fair price?

A. I do.

Mr. Anthony: No further questions.

Cross-Examination

By Mr. Deuel:

Q. Mr. Clarke, you stated that in your opinion the carrying capacity of this area was approximately twelve hundred head of cattle. [143]

A. Yes, sir.

Q. When you stated that, did you have reference to the condition of the land before you had divided the area into paddocks or after dividing, properly broken down?

A. Well, at the time they were carrying considerable of a herd on the area when we went down there before the fencing was put in. I believe the fencing was completed, and that area would

(Testimony of John K. Clarke.)

make a nice little ranch, particularly when it is in conjunction with the other lands that the McCandlesses own. It would make a very nice little ranch.

Q. What I am getting at, Mr. Clarke, is that——

A. I get your point, yes.

Q. Your statement pertains, does it not, to the area broken down into the paddocks?

A. I believe that area would have carried a thousand head of cattle very easily prior to the fencing.

Q. Now, getting to your estimate of the rental value of that land down there, what is your basis for stating that you consider it worth \$3 an acre? Do you just pick that out of the air from your general experience, and so forth? A. No.

Q. Or are you comparing that to other leases?

A. Well, the Puuwaawaa Ranch, for instance, has an area up in Kona—and, by the way, lands on that island are not so valuable as they are on this island because of the closeness [144] to the market. We are paying \$6 an acre up there in Kona. Of course, that is developed land.

Q. That area, though, when was that lease entered into?

A. Prior to the war. We paid \$6 an acre for it, and we are making money on it.

Q. Is that Territorial owned land?

A. No, it is owned by a private individual by the name of Gouveia.

(Testimony of John K. Clarke.)

Q. You have in mind in arriving at your figure other leases of land owned by the Territory, though?

A. Well, this particular area, as I say, I am very familiar with, and we are running cattle on that. We can run as much as a head to an acre, which is very good. We are paying \$6 an acre for that. Certainly this is worth \$3 an acre.

Q. That, you stated, is privately owned land?

A. Yes, but even so, whether it is privately owned or Government owned the values are still there.

Q. You realize, do you not, that in a Territorial lease the lease is always subject to cancelation?

Mr. Anthony: I object to that. That is a question of law, what they are subject to.

The Court: Well, I think it is a fair question, to compare a Territorial lease with a privately owned lease.

The Witness: But those cancelations are only [145] because of some specific purpose. I mean, we have held Government leases for many years. Puuwaawaa Ranch is almost entirely made up of Government leases. We have held them for years and years and there has been no trouble about cancelation.

Mr. Deuel: No further questions.

Mr. Anthony: No further questions.

Examination

By the Court:

Q. There is considerable waste land in these two

(Testimony of John K. Clarke.)

lease-holds that are under consideration here, 1740 and 1741, is there not?

A. Not so much. It don't compare, for instance, with Puuwaawaa.

Q. There are almost inaccessible ridges?

A. Well, there are some ridges in there, but on the whole I have taken that into consideration. On the whole, I believe this \$3 an acre is a reasonable rental for it.

Q. Taking that ranch as a whole, about how many acres would it take to maintain a head of cattle year in and year out?

A. I judge somewhere between three and four acres to the animal.

Q. That would be very good pasture land, wouldn't it?

A. Yes, that can be made into very good pasture land. [146]

Q. Are you thinking of just the best of that in the Makua Valley there or are you thinking of the whole of it?

A. The whole of it.

Q. How did that compare with McCandless Estate pasture land on the other side of the Waianae range?

A. Honouliuli?

Q. Yes, from there on.

A. Well, some of the land at Honouliuli is better. The Kahuku lands, some of it is quite poor. They compare very well.

Q. Well, the McCandless Estate doesn't get a rental of \$3 an acre, does it?

A. No. Of course, that was put up quite some

(Testimony of John K. Clarke.)

time ago. My recollection is that Honouliuli went for \$15,000 a year. I have forgotten off-hand what the area is.

Q. Well, it is much less than \$2.50 an acre, isn't it?

A. I have forgotten what the area of that Honouliuli ranch area is.

Q. Now, are you familiar with rental prices along the slope of the Koolau Range? Quite a lot of pasture lands along there.

A. Rentals have gone up quite a bit for cattle land. Prices have gone up on beef cattle. In the old days we used to get 50 to 60 dollars a head and now we are getting over [147] a hundred dollars a head, so the rentals have naturally increased in proportion.

Q. Now, the quality of stock that you saw out there on the McCandless Ranch, what would you say as to that?

A. It showed improvement the last time I was down there. It showed improvement over what I had seen some years before.

Q. Well, some years before you had seen nothing much but longhorns?

A. Yes, that is so, but there had been an improvement in the stock. Apparently, they had gotten in some new bulls. I was really surprised at the improvement in the stock the last two visits I made down there.

Q. That is in the younger stock?

A. That's right. That's right.

(Testimony of John K. Clarke.)

Q. What kind of bulls were put in there?

A. Herefords.

The Court: All right. Thank you.

The Witness: Thank you.

(Witness excused.)

Mr. Anthony: That is our case, your Honor.

Mr. Deuel; If the Court please, at this time, pursuant to Rule 41(b), I move for dismissal of Paragraph 3 of the Complaint on the ground that the facts and law the plaintiff has shown no right to relief. And in support of [148] that motion, your Honor, we contend that the Private Law under which this suit is being brought does not encompass the paragraph as stated. I also contend that the Paragraph 3 contains no cause of action against the United States; further that the leases were in fact validly canceled and therefore there is no cause of action, that there is no compensable interest as against the United States for the occupancy of this land; and that there was acquiescence in the cancelation on the part of the McCandless Estate.

(Argument by Counsel on the Motion.)

The Court: Would this be a handy time to take a noon recess.

Mr. Anthony: Yes, it would. What time will we reconvene, your Honor.

The Court: Well, we had better save all the time we can. Half past one.

Mr. Anthony: All right.

(Thereupon, at 11:45 a recess was taken until 1:30 p.m. of the same day.) [149]

Afternoon Session 1:40 p.m.

(Argument on motion continued.)

Mr. Anthony: I move at this time for leave to amend the Complaint to add a paragraph praying for damages for the use and occupation of the leasehold premises from December 7, 1941, to December 31, 1946, by the United States Army.

The Court: 29.

Mr. Anthony: December 29, 1946, by the Armed Forces of the United States.

(Argument by Counsel.)

The Court: The motion to dismiss Paragraph 3 is denied, with right in the plaintiff to amend that paragraph if the plaintiff so elects, subject in the amendment as to the consideration of the Court.

Mr. Anthony: Very well, your Honor.

Mr. Deuel: May the record show objection on the part of the Government.

The Court: Yes, an exception to the ruling. Now from here where do we go next?

Mr. Anthony: We have completed our case.

(Recess had.)

Mr. Deuel: If the Court please, I have a man here as my first witness who has just come in from his pig farm [150] and didn't realize he should have a coat, and I should like your Honor's permission to put him on the stand.

The Court: That is all right.

The Clerk: Just take the stand here, please.

EDWARD HIROKI

called as a witness on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

The Clerk; Just sit down, please.

Direct Examination

By Mr. Deuel:

Q. Will you please state your name.

A. My name is Edward Hiroki.

Q. And you reside where?

A. I live at 833 Lunalilo Road.

Q. And you were born and raised on this island, Mr. Hiroki?

A. Yes.

Q. And what is your occupation, Mr. Hiroki?

A. Well, I am a hog raiser.

Q. What type? Hog, did you say?

A. Yes.

Q. And how long have you been in that business?

A. Ever since the latter part of 1940.

Q. And how large a business do you have?

A. I have five acres of leased land from the Bishop [151] Estate and two acres and a half of which have been devoted to raising the hogs.

Q. Do you have very many hogs?

A. Right now I have just about 175 head of hogs.

Q. Is that about the average number you have?

(Testimony of Edward Hiroki.)

A. No, I used to have close to 350 hogs during the war.

Q. And during your experience in this business have you had experience in buying and selling hogs?

A. Yes, I did quite a bit of buying and selling the latter part of the war, that is, about 1944 and 1945.

Q. Do you have a knowledge of values of pigs, or hogs, back in 1942, particularly the first half of 1942?

A. March, according to the——

Q. I don't want you to state any values now.

A. I see.

Q. I just want to know if you have a knowledge, if you have refreshed yourself and looked up records.

A. Well, the early part of 1942 and the latter part of 1942 the reason—May I state?

Q. Yes.

A. The prices fluctuated, you see.

Q. Fluctuated?

A. Yes.

Q. What I mean, Do you, from your recollection and [152] from checking records, have a knowledge, though, of what the values were at that time?

A. Yes, I do.

Q. You stated that you were born and raised on this island, Mr. Hiroki. Are you familiar with the area of the island around toward Kaena Point, one area generally known as Makua Valley?

A. Kaena Point is just—to my memory just recently that area has been just recently occupied as a part of the piggery sights. Up until the time

(Testimony of Edward Hiroki.)

I went into the business I don't remember hardly any piggery up there.

Q. What I am meaning is, Do you know that end of the island; I mean, know what the territory is like around there, what the ground is like, what the mountains are?

A. I do to a certain extent.

Q. Know the general condition? A. Yes.

Q. You mentioned something about a University. Did you attend the University?

A. Well, I was graduated from the University of Hawaii in 1938, majoring in animal husbandry.

Q. Mr. Hiroki, I am going to ask you a fairly lengthy question. If you don't understand it, let me know.

Considering a fairly large group of pigs, we will say, which pigs ranged all the way from little babies, new born [153] pigs, up to the older ones, more or less usual numbers that might be in a group of that kind, the pigs being in an area such as the Maqua Valley, which you are familiar with, principally not being enclosed but having freedom to range throughout the valley over an area of, say, 2500, acres and free to range up into the hills, a group of pigs which were of the, we will call, domestic type by having that freedom to range, and the average weight of the pig being approximately 50 pounds, can you give us your opinion of the average value of those pigs in the first part of 1942, with the understanding that you have to go

(Testimony of Edward Hiroki.)

out and get those pigs and find them as they are on the ground, not that they are delivered to you? I don't want you to give me a figure now.

A. Yes.

Q. But do you feel you know what that value was in 1942?

A. The usual practice we employ is, Suppose a fellow wants to buy feeder pigs. They usually go to the piggery and pick whatever pigs they want, with the condition you just stipulated, acreage of 2,400 acres, and I have to go to the farm and pick up the pigs myself. Well, that is—really, we never thought of doing such a thing anyway. This is the first time I ever heard of it, and actually, probably just to get fifty or a hundred hogs you have to spend a few days to corral that amount of hogs because the vast area of pasture [154] land is actually involved, unless the pigs are confined to a certain portion of the land where you can detect the hogs right away.

Q. Can you tell me this: Supposing the pigs, the same group of pigs—I don't know whether it is a proper term—be gathered up or rounded up so you can go out there and just pick them up, can you tell us what the value would be?

A. On that basis those pigs, as you say, are domesticated animals.

Q. Assuming they are domesticated animals, but animals which have been running all over this large area.

A. In those days I used to sell them, as well

(Testimony of Edward Hiroki.)

as to buy these weaners, went up to about fifty-pounders, we used to get about \$10 apiece. That is just about the maximum price we used to get. That is the domesticated animal; you actually go the pig-gery and pick it up yourself or ask the farmer to deliver to his farm.

Q. That means you go there and you don't have to go out in the mountains?

A. No, you don't have to waste your time. The time is minimized to the point.

Q. That, you stated, would not exceed \$10. Assuming you have to go out and round up all these pigs, would that make the pig worth less to you?

A. Well, you have to consider your time, too, so [155] naturally I wouldn't pay maximum price per head, maybe should be a little cheaper than I actually paid to the farmers who keep their pigs in the pen.

Q. You wouldn't pay as much as \$10 for them?

A. No, I wouldn't.

Mr. Deuel: You may cross-examine.

Cross-Examination

By Mr. Anthony:

Q. You say the fair price per head of a pig weighing 50 pounds was \$10 in 1942?

A. Yes, that was the price I used to get.

Q. Did you sell them for that or did you buy them for that?

(Testimony of Edward Hiroki.)

A. I sold them as well as I bought them, too.

Q. How much was pork selling for a pound at that time?

Mr. Deuel: Objection, your Honor. What pork itself was selling for is irrelevant to the question of what a pig out on the ground was worth.

The Court: Overruled.

Mr. Anthony: I am testing his knowledge as an expert.

The Witness: Well, I am not a butcher.

Q. (By Mr. Anthony): Do you know?

A. That is——

Q. Do you know? [156]

A. I do to a certain extent.

Q. Well, what is it?

A. Those days a pound of pork was not more than 30 cents a pound, I am quite sure.

Q. Do you recall all of the activity that was going on in this Territory to increase the production of pork here on this island?

A. To a certain extent I do.

Q. In 1942?

A. To a certain extent I do.

Q. Do you remember the Military Governor got out orders on slaughter houses and a lot of regulations about slaughtering? A. Yes, I do.

Q. And that was to increase the hog-raising production? A. That's right.

Q. And do you mean to say that \$10 a head for a 50-pound pig was a fair price at that time?

(Testimony of Edward Hiroki.)

A. Yes. The OPA went into effect sometime in March, 1942. The highest price we got was 22 cents a pound up to 175, to 200 pounds, that was sold.

Q. The highest price you got was?

A. Twenty-two cents a pound.

Q. That is on the hoof?

A. Yes. And a carcass was not more than 35 cents a [157] pound.

Q. The what?

A. Carcass. That is the whole carcass you buy from the pork center, not more than 35 cents a pound.

Mr. Anthony: No further questions.

Examination

By the Court:

Q. Wouldn't there be any preference—would there be any difference in the price between pigs that were hand fed and pigs that had to find their own living off guava beans or roots, or whatever they could get, grass, and so forth?

A. As a whole, the wild pigs, the meat tastes a little smelly; therefore wild pigs usually don't go into the public market. Probably those wild pigs may go out to private use. Just eating the berries, the grasses, and all that sort of thing, that would affect the quality of the meat, and usually the butcher don't buy those types of pigs. It tastes different.

Q. The pigs that were brooded in a pen and fed

(Testimony of Edward Hiroki.)

for a little while while they were young, just tiny pigs, and then just turned loose on the range, would that be a different class of pigs than what you referred to as wild pigs?

A. Yes, that is a different class.

Q. Well, would there be any difference in the price of those pigs which were just running, you might say, wild [158] to suit themselves, and nobody fed them, they had to find their own feed after they had been weaned from their mother, would there be any difference in the price between them and stall fed pigs?

A. Am I to understand that the wild pigs you catch it and domesticate it, that is what you meant, Judge?

Q. No. Pigs that had been bred from a brood sow and a domesticated boar.

A. Yes.

Q. That is, a boar that was of good stock, although he perhaps had the necessity of making his own living, but pigs that hung more or less around the land, the offspring that just ran where they would and found their own living from roots, or picked up beans, and all that, would there be any difference in the price on the market between those and stall fed pigs, pen fed pigs?

A. No difference in price provided the condition the same.

Q. They wouldn't fatten so quick on the range as they would if they were pen fed, they wouldn't get so fat?

(Testimony of Edward Hiroki.)

A. Well, in this set-up I don't think there is any difference.

Q. Do you know anything about pigs that just run at large and then occasionally get a bag of kiawe beans or something of that kind, pigs that respond to call, do you [159] know anything about hog calling? A. To some extent I do.

Q. Well, that class of pigs, are they any different in the market from pen fed pigs?

A. Well, Judge, you are talking about domesticated animals. The wild pigs will never come to your calls.

Q. How long after they have been weaned and run wild, that is, run at their own pleasure, before they would become wild, as you would class it?

A. Well, usually the pig's lifetime is between eight to twelve months, so if the pigs are unable to see the human beings for a few months, I am quite sure those pigs would be wild as can be.

Q. Pretty hard to catch?

A. Yes, that is the point.

The Court: All right.

Mr. Deuel: That is all, Mr. Hiroki.

Mr. Anthony: No further questions.

(Witness excused.)

Mr. Deuel: Would you indulge me just a second, your Honor.

I call Mr. Kanahele to the stand.

FRANCIS H. KANAHELE

called as witness on behalf of the Defendant, being first duly sworn, was examined and testified as follows: [160]

The Clerk: Sit down, please.

Direct Examination

By Mr. Deuel:

Q. Will you state your name, Mr. Kanahele, your full name.

A. Francis H. Kanahele.

Q. Your residence?

A. 123 Bates Street, Honolulu.

Q. And what is your present employment or occupation?

A. Public Lands Executive Officer.

Q. And you have been in that capacity for some time?

A. A little over a year.

Q. As such are you one of the custodians of the records of the Public Lands Office?

A. I am.

Q. Do you have with you, Mr. Kanahele, the file on Territorial General Lease 1740?

A. I do.

Q. And in that file do you find a letter dated January 16, 1929, from C. T. Bailey, Commissioner of Public Lands, to Mr. L. L. McCandless?

A. I have.

Q. May I ask you if this is a true copy of the one in your file?

A. It is. [161]

Q. Now, is it customary in your office, Mr.

(Testimony of Francis H. Kanahele.)

Kanahele, that letters that appear in that file have gone out through the regular course of the mails?

A. It is customary.

Q. To the party addressed thereto?

A. That's right.

Mr. Deuel: This letter pertains to a matter I was discussing earlier your Honor, the previous withdrawal of a portion of these lands from Lease 1740, and I offer it in evidence.

Mr. Anthony: We have no objection.

The Court: January 16, 1929?

The Clerk: That's right, your Honor.

Mr. Deuel: That is right, a withdrawal from this General Lease No. 1740 in 1929.

The Clerk: United States Exhibit No. 3.

(Thereupon, the document above referred to was received in evidence as United States Exhibit No. 3.)

Cross-Examination

By Mr. Anthony:

Q. Mr. Kanahele, how long have you been in the Land Office?

A. As this capacity a little over a year.

Q. You don't know anything about this transaction then, [162] do you, of 1929? A. No.

Q. Except what you can see in the record?

A. That's right.

Q. Did you bring the record of the exchange of kulianas that was made between L. L. McCand-

(Testimony of Francis H. Kanahele.)

less and the Territory at the same time this withdrawal was agreed upon? A. I did not.

Q. Well, would it show in that file that you have there if this was a part of a larger transaction? Would it show in that file?

A. Certain sketches of it would, but not the entire.

Mr. Anthony: May I see your file, please?

(Handed to Counsel.)

The Court: Mr. Deuel, you have how many more witnesses this afternoon?

Mr. Deuel: I have two witnesses. Dr. Willers arrived. That will take I don't think more than five minutes. And Mr. Addington, who is here from Schofield who will probably take ten or fifteen minutes. It all depends on cross-examination.

The Court: Well, I was just going to find out whether I should notify my doctor I wouldn't be there.

Mr. Anthony: I have no further questions of this witness. [163]

Mr. Deuel: Do you have any questions of the witness, your Honor?

The Court: No.

Mr. Deuel: You may be excused. I would like, before proceeding, to read this letter to your Honor.

The Court: I read it.

(Witness excused.)

Mr. Deuel: Call Dr. Willers.

ERNEST H. WILLERS

called as a witness on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Just sit down, please.

Direct Examination

By Mr. Deuel:

Q. Your full name, please, Dr. Willers.

A. Ernest H. Willers.

Q. And your residence?

A. 5797 Kalanianaʻole Highway.

Q. And your occupation and employment?

A. Territorial veterinarian with the Board of Agriculture and Forestry.

Q. And how long have you been in that capacity?

A. Since 1937.

Q. And in that capacity, Dr., do you, or your office, have charge of making tests of groups of cattle from time to [164] time for tuberculosis?

A. We do.

Q. Does your record show whether or not you made any tests of the McCandless cattle in 1941 and 1942, McCandless Estate?

A. Yes, we made some tests of small groups of cattle during both 1941—and, well, several groups of cattle in 1941 and one larger group in 1942.

Q. Will you please tell us what dates, starting with the 11th of March, 1941, I believe was one of your tests in 1941, and give us the number of cattle tested and the number found to be infected with tuberculosis, and go on down through 1942.

(Testimony of Ernest H. Willers.)

A. The test on March 11, 1941, shows on a test of 50 animals of which eight reacted and forty-two——

Q. When you say “reacted,” don’t you mean that shows tuberculosis?

A. That is evidence of tuberculosis by that particular test, yes.

On the 24th of March, 1941, forty-one animals were tested. One animal was found as a reactor.

On April 29, 1941, twenty-one animals were tested and no reactors were found.

On May 6, 1941, forty animals were tested and no reactors were found. [165]

On July 5, 1941, twenty-nine animals were tested; one animal was found as a reactor.

Those are all of the tests in 1941.

On April 27, of 1942, one hundred three animals were tested of which thirty-six were found as reactors. Those are all of the tests in ’42.

Q. You haven’t totaled the numbers that that would come to and the number infected?

A. I have not.

Mr. Deuel: We will let that go. That is a matter of mathematics, your Honor, which we can calculate. I have done so and will refer to it later.

You may cross-examine.

Cross-Examination

By Mr. Anthony:

Q. Where were these cattle that you tested, the fifty, March 11, 1941?

(Testimony of Ernest H. Willers.)

A. I don't have a record of the place of testing.

Q. You don't know what valley it was?

A. No, I do not.

Q. You don't know where any of these tests were?

A. There was a mark on the test in 1942 and I do not know whether it is right or not. It is Ohikilolo. It is the only notation following any of these tests. These animals were the property of the L. L. McCandless Estate, and that is [166] all I know about it.

Q. Would it be possible that the tests made in 1941 were at Waimalu?

A. Quite possible, yes.

Q. By the way, Dr., did you make the tests yourself or did you have one of your subordinates do that?

A. I believe I made most of the tests myself, but I wouldn't be positive of all of them.

Q. Do you have any recollection of going down to Waimalu in 1941?

A. Yes, I recall that there was a feeding experiment going on down there at that time.

Q. When you use the expression "reacted" that may or may not mean that the cattle are tubercular; isn't that true?

A. Yes. We do believe that the test is quite specific, but it doesn't mean that the animals have actual visible lesions of tuberculosis.

(Testimony of Ernest H. Willers.)

Q. And an animal may have a reaction and get over it; is that correct?

A. You mean it might react on one occasion and not upon another?

Q. Yes. Is that possible or not?

A. Well, it might be possible. However, in the main an animal that is infected would continue to react on subsequent tests if the tests were not too frequent. [167]

Q. What steps do you take after you ascertain animals that have a reaction?

A. In this instance the work was being done on a voluntary basis between the owner and ourselves as the Board of Agriculture, Division of Animal Industry; we were not operating under regulation, because range animals at that time did not come within our regulation.

The practice in this particular instance was to mark the animals by slitting the ear, or other physical marking, and as the management could, they would send them to slaughter. That might take a matter of weeks until they could market them.

Q. So far as marketability is concerned, does an animal have to have lesions in order to render it non-marketable within your regulations, or what is the situation, Dr.?

A. No, the decision upon the use of the carcass for food is based upon the amount of infection that is found on examination at slaughter. It has nothing to do with the original test.

(Testimony of Ernest H. Willers.)

Q. But does it have anything to do with tubercular lesions?

A. Yes, depending upon the amount found at slaughter the decision is made whether it can be passed for food or should be condemned.

Q. Do your records show whether or not the cattle [168] that you tested had any lesions?

A. No, they do not.

Q. Would it have been noted, Dr., if that were the fact?

A. Not in this instance, no. We do on dairy cattle. That came under our regulations, but since this was a feeding project, we kept no further records on it.

Mr. Anthony: That is all.

(Witness excused.)

Mr. Deuel: Call Mr. Addington, please.

MARTIN R. ADDINGTON

called as a witness on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Just sit down, please.

Direct Examination

By Mr. Deuel:

Q. Will you please state your full name?

A. Martin R. Addington.

Q. Your residence?

A. Sunset Beach, Waialua.

Q. And your occupation?

A. Civil engineer.

Q. Pardon?

A. Department of the Army, Civil Engineers, Department of the Army.

Q. How long a time have you been with the Army? [169] A. November, 1930.

Q. And will you tell us something of your duties with them, with the Army, particularly during the early days of the war?

A. The early days of the war I first started out in Hawaii when the war first broke out.

Q. I am sorry, I can't quite hear you.

A. I say at the start of the war I was in Hawaii on the construction of the Hilo Airport. I was transferred over here to Field Area 3 in 1942, in March.

Q. You say you were in construction work?

(Testimony of Martin R. Addington.)

A. That's right.

Q. Have you had very much experience in construction work? A. Since 1923.

Q. And does that include construction of all kinds? A. Yes, sir.

Q. Buildings and facilities for properties, and so on? A. That's right.

Q. You say you have had a great number of years' experience? A. Since 1923.

Q. In connection with your work, Mr. Addington, were you familiar with the operations and what was going on during the early part of the war down at the Makua Valley on this [170] island?

A. Yes, sir.

Q. Do you know anything about any buildings—Do you know where the Ohikilolo area is, the McCandless Ranch area? A. I do.

Q. Do you, of your own knowledge, Mr. Addington, know whether or not the Army placed any improvements and did work on the Ohikilolo property for the McCandless Estate?

A. They did, yes, sir.

Q. Do you have a list which you have prepared showing those improvements and the work done?

A. Yes, sir.

Q. And will you briefly tell the Court what those improvements were. You don't have to go into what——

A. I would like to state this, that Mr. Marks and I and his wife went down there in the early

(Testimony of Martin R. Addington.)

part of the war to his beach home there, when we were moving his furniture out and getting ready to move the ranch hands and his servants' quarters on down below to these different areas. I believe you recall that, don't you, Mr. Marks? And the Government at that time, they built some demountable buildings for his employees and for his ranch house and for his ranchers, and I have a list here. We built a 16.8 x 30 demountable for maid and husband amounting to 502.5 square feet and [171] built a 108 x 108 bathhouse for the maid and husband right by the sand dunes, Waianae way, and outside toilets. We built a 30 x 40 ranch house, bunk house, there right adjacent to his ranch house. That was a tongue and groove ranch house.

Q. In the interest of saving time, Mr. Addington, does that list you have before you—You say you prepared yourself?

A. Yes, sir, I did.

Q. And does it list the various improvements that you know that the Government placed on the McCandless property at Ohikilolo?

A. Yes, sir.

Q. Does it also list some of the work that was done on the property?

A. Yes, sir, water lines, moving tanks, pig pens and chicken runs, moving furniture up at that time on Mr. Marks' residence.

Q. Have you had in your experience a considerable amount of experience in estimating costs and valuations of construction?

A. I have.

(Testimony of Martin R. Addington.)

Q. You have also stated on this list a cost factor and your estimate of value?

A. I took the prices approximately in 1942 and 1943 to estimate this list. [172]

Q. That is when the work was done?

A. Yes, sir.

Q. What is the total valuation of your estimate there of the work which was done at Ohikilolo by the Government for the McCandless Estate?

A. \$16,587.50.

The Court: How much?

The Witness: \$16,587.50.

The Court: Actual cost?

The Witness: Yes, sir.

The Court: That is material?

The Witness: That is material and labor.

The Court: And labor. Sixteen thousand—

The Witness: \$16,587.50.

Q. (By Mr. Deuel): That work and those improvements were all on the Ohikilolo property and do not include any improvements, then, for other people, such as improvements placed on the beach for other parties? A. No, sir.

Q. I ask you if this is a true copy of the records that you prepared or if that is one that you prepared.

A. This is the one that I prepared.

The Court: Was all that new material or was some of it material from torn down structures on another part of the McCandless land? [173]

(Testimony of Martin R. Addington.)

A. Most of the houses—all of the houses and all the improvements except the water lines and chicken houses that were removed was new material.

Mr. Anthony: We object to this offer, your Honor, on the ground of relevance. This has nothing to do with Lease 1740 or 1741. This has to do with land which is owned in fee simple by the McCandless Estate.

The Court: Well, I supposed that this was introductory to some showing that these improvements were made and furnished by the Army as some sort of a compensation for damage created over on Makua.

Mr. Deuel: That is correct, your Honor. This is in the nature of a set-off in the event the McCandless Estate should be awarded damages for the use and occupancy and disturbance in their leasehold there. The Government claims that they have in turn been benefited to this amount in conjunction with that move. These buildings were placed upon the Ohikilolo property for the McCandless Estate at the request of the McCandless Estate.

Mr. Anthony: The improvements were on the land owned in fee simple.

The Court: Well, that, of course, I don't know anything about.

Mr. Anthony: I will put Mr. Marks back on the stand, but I think we are getting pretty far afield here. [174]

The Court: What the understanding was would be of importance; whether these improvements

(Testimony of Martin R. Addington.)

made by the Government far exceeded the value of those that were on the fee simple and were a compensation in part for damage done, I don't know. I think at the present time that it is proper in the record. It may be "kicked out" if it doesn't mean anything.

Mr. Deuel: I am offering this in evidence, your Honor.

The Court: All right.

The Clerk: U. S. Exhibit No. 4.

(Thereupon, the document above referred to was received in evidence as U. S. Exhibit No. 4.)

Mr. Deuel: You may cross-examine.

Mr. Anthony: No questions.

The Court: That is all.

(Witness excused.)

Mr. Deuel: If that meets with your Honor's approval, that is the witnesses we have now.

The Court: Yes. Well, I am quite glad to take an adjournment now. Tomorrow afternoon, I think I told you gentlemen a couple of days ago, I have some other matters set, but I can hear you until noon tomorrow, and if it is not inconvenient to either one of you, I will be glad to start court half an hour earlier tomorrow.

Mr. Deuel: As far as I am concerned—— [175]

Mr. Anthony: How many witnesses?

Mr. Deuel: I am afraid I have more witnesses than we can dispose of in the morning. I have possibly five more witnesses, your Honor.

The Court: Well, if they are of a general run——

Mr. Deuel: No, two of those witnesses, your Honor, have had a great deal of experience in this area and will probably be on for a considerable length of time. The third is a real estate expert here. I am sorry, I would like to accommodate the Court and be able to get through in the morning, but I feel it would be prejudicial to the interest of the Government to rush it.

The Court: Well, we will have to go over until Friday morning then.

Mr. Anthony: Will we go on tomorrow morning?

The Court: Yes.

Mr. Anthony: If we are not finished, we go on Friday morning?

The Court: Yes. Now, what time do you want to start in the morning, half past nine or ten?

Mr. Anthony: Same hour is satisfactory.

The Court: All right.

(Thereupon, at 4:05 p.m., February 15, 1950, an adjournment was taken until February 16, 1950, at 10:00 a.m.) [176]

February 16, 1950

The Clerk: A. Lester Marks and Bishop Trust Company, Limited, Executor, Administrator C.T.A., and Trustee of the Estate of L. L. McCandless, Deceased, Plaintiffs, vs. United States of America, Defendant. For further trial.

Mr. Deuel: Call Mr. Sanborn.

PERCY D. SANBORN

called as a witness on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Just sit down.

Direct Examination

By Mr. Deuel:

Q. Will you please state your full name.

A. Percy D. Sanborn.

Q. I would appreciate it if you would speak up a little bit louder, Mr. Sanborn. Your residence?

A. Honolulu. You want my address—Tantalus.

The Court: That is enough.

Q. And your occupation, Mr. Sanborn?

A. Assistant manager of Kahua Ranch, Limited.

Q. And how long have you been with Kahua Ranch?

A. Since August, 1936.

Q. Continually since 1936?

A. Yes.

Q. And the nature of the business? What is the nature of the business?

A. Livestock raising and wholesale.

Q. Buy, sell, and deal in livestock generally, and raise them?

A. That's right.

Q. Had you had any previous experience in the cattle business prior to working with the Kahua Ranch?

(Testimony of Percy D. Sanborn.)

A. Yes, I was born on the ranch and more or less in the business up to the time I went to Kahua.

Q. During that time did you work with cattle to any extent?

A. Yes, I did.

Q. And did you have any occasion to learn or know cattle values during that experience?

A. Somewhat, as a kid.

Q. And since you have been with Kahua Ranch, has your work there brought you into contact with cattle values?

A. Yes, it has.

Q. To any great extent? What have you done that would give you knowledge of cattle values?

A. Well, I have had authority at times to go out and buy cattle and sell cattle, and I have been managing the slaughter house for ten years, which has given me experience of beef values.

The Court: Where is Kahua Ranch?

The Witness: The main ranch is in Kohala, Hawaii. We have a slaughter house on Oahu at Honolulu. We now have some land there at Waialua.

Q. (By Mr. Deuel): Over the period of the last fourteen years, then, or since you went to work with them in 1936, you have had considerable dealings in cattle with respect to values, knowing the buying and selling prices?

A. Yes, I have.

(Testimony of Percy D. Sanborn.)

Q. And have you maintained any records in that regard?

A. Just keep records.

Q. Yes. Those you have available to you, though?

A. Yes, I do.

Q. Do you, from your knowledge and recollection and from examining the records, have knowledge of cattle values along the first half of 1942?

A. Yes, I do.

Q. Now, Mr. Sanborn——

Mr. Deuel: May I have Exhibit 1, please, the map.

The Clerk: That is Exhibit A, Joint Exhibit A.

Mr. Deuel: Exhibit A.

Q. (By Mr. Deuel): I show you a Joint Exhibit A here, which is of the northwesterly part of the island up near Kaena point. Outlined on that are two areas outlined in blue, one [179] being generally known as the Makua area and the other one as the Kuaokala, and comprising areas on which the McCandless Estate formerly operated a cattle ranch. Are you, and have you been, familiar with those areas?

A. I have never been in the Makua Valley. I have only been possibly a hundred or two hundred feet off the highway into it. Kuaokala, I have been up to the edge of the cliff, starting off from Makua and just covered a very small portion of it.

Q. But you were up on the property, though?

A. Yes.

(Testimony of Percy D. Sanborn.)

Q. And when was that?

A. I don't recall whether it was '40 or '41.

Q. In 1940 or 1941 you were up on that property?

A. Just on a small portion of it.

Q. And you have on occasion gone by the Makua area so that you could look up into it?

A. Yes, I have.

Q. And you have been on this island a number of years, of course, and know the nature of land of that kind?

A. I have a fair idea of it.

Q. On that occasion when you were up on the Kuaokala area, will you tell us what you were doing and how you happened to be there?

A. I was asked if I would like to go up with—— [180]

Q. Asked by whom?

A. By Mr. Rainy. I don't know whether he was working for the McCandless Estate at that time or not, but he invited me to go up and rope cattle with him.

Q. And what did you do up there?

A. They were up trying to get some cattle out, and I was just a helping hand.

Q. You were working up there that day?

A. I was actually a guest helping them round up the cattle that they wanted to get.

Q. You were assisting in rounding up some cattle in that area; is that right?

A. That's right.

(Testimony of Percy D. Sanborn.)

Q. Then, on that occasion did you have occasion to observe some of the cattle up there?

A. I saw one small group, yes.

Q. Only one group?

A. That is all I saw. Well, I would say I saw one group in a bunch and then I saw some scattered over the hills. I was not too close to them.

Q. Did you observe the cattle enough to know the type of cattle those were?

A. Yes, this one group; I got fairly close.

Q. What can you say with regard to what those cattle were like, based on your observation and experience in the [181] business?

A. They were strong cattle.

Q. What?

A. They were strong. They weren't what we would call ready for market. There were quite a few females in there, too, so I presume they weren't going to market, but they were strong, healthy cattle, outward appearance.

Q. Have you, in your work with the Kahua Ranch, handled any of the McCandless cattle from these ranch areas?

A. Yes, they have sent cattle to Kahua Ranch for slaughter.

Q. You have seen those cattle as they were brought in, or as the Kahua Ranch got them?

A. I saw part of them, yes, not all.

Q. Can you state whether or not those cattle were what are generally termed "scrub type" cattle?

(Testimony of Percy D. Sanborn.)

A. Well, they aren't as high a quality as you can find in the Hawaiian Islands.

Q. How would they compare, generally, with the cattle that the Kahua Ranch has?

A. I do think our cattle are a little better.

Q. Mr. Sanborn—oh, yes, from your experience with the Kahua Ranch, have you checked back with regard to cattle being brought or obtained from the McCandless Estate and brought to the Kahua Ranch for slaughter, or otherwise, and [182] do your records show whether or not there was any tuberculosis in the herd, or the ones brought in?

A. I kind of object to that question because I don't feel I have the authority to divulge records of the Company.

Q. I think you have the authority. It is being asked you in court.

A. Well, I don't want to do it without the general manager's OK and the owner's OK. That is something I am hired to do, and I don't know whether I am empowered to do it or not.

Mr. Anthony: What was the question?

Mr. Deuel: I asked him whether or not his records disclosed any evidence of tuberculosis when cattle were brought in.

Mr. Anthony: We have no objection to that. Go ahead and answer the question.

The Witness: Yes, it does. I just want to be clear. I hope you understand. I don't want to get my "neck jumped on." Yes, as manager of the slaughter

(Testimony of Percy D. Sanborn.)

house I have seen McCandless cattle condemned due to T.B. and just what percentage of the kill depends on what period of time you want to take.

Q. (By Mr. Deuel): I am talking about this period. You recall I asked you the other day if you would check back through your records for the period around 1941 and 1942. [183]

A. Yes, I did. I took from January 1, 1942 through July, I think it was, and I have a note here, if you don't mind my checking.

Q. Is that the period you are talking about you found some tuberculosis to exist? A. Yes.

Q. Now, Mr. Sanborn, I am going to ask you a question with regard to valuation of cattle.

The Court: Let's finish the other subject first. I don't get much out of generalities. He was going to get some figures; I thought he was on the point of doing that. For a given date between January 1, and what was the other date?

The Witness: July, 1942.

The Court: Have you the figures? How many?

The Witness: This may be subject to correction, but in my adding up the figures it came to 204 head of cattle slaughtered.

The Court: Yes.

The Witness: And sixteen, as far as my records show, now subject to correction, sixteen head were condemned because of T.B.

The Court: How does that compare with your own cattle and other cattle that you slaughtered?

(Testimony of Percy D. Sanborn.)

The Witness: Basing it against Kahua, I don't know of [184] any off-hand of our own raise that have ever been condemned for T.B. That is, during the period that I have worked for Kahua.

The Court: How about others that you buy for slaughter?

The Witness: The rate is very low, generally speaking. It would be a fraction of a per cent.

The Court: All right.

Q. (By Mr. Deuel): Did I understand you to say, Mr. Sanborn, that from a little over 200 head of cattle that there were sixteen that were condemned?

A. That's right.

Q. That then roughly figures close to 8 per cent?

A. Close to 8.

Q. And now, Mr. Sanborn, based upon your experience in this field any your knowledge of cattle values, relating back to early 1942, assuming that you take a herd of cattle that are of the scrub type, considerably inbred, some tuberculosis existing in the herd, many of the cattle being quite wild, they being scattered, or ranging over a fairly large area of land, such as the area that you are familiar there with, the Kuaokala and the Makua areas, and also many of them up into the forest reserve areas, can you give us what your estimate of the fair value, on the average, of those cattle would have been to a purchaser who had to go in [185] and take them on the hoof, so to speak, or on the ground as they existed there, not being brought up into a corral.

(Testimony of Percy D. Sanborn.)

Mr. Anthony: I object to the question on the ground that it is incomplete, your Honor. The testimony is to the effect that the breed had been improved by introduction of purebreds. In fact, Mr. Clarke testified to that. There is nothing about "inbred" in the evidence.

Mr. Deuel: I am asking a hypothetical question here, your Honor, and I will agree with Counsel that as the evidence stands at present there is nothing about inbreeding. However, I submit the question is proper because I am going to bring that evidence in to substantiate it. I am putting Mr. Sanborn on now because he wants to get back out to his operations.

The Court: Well, until you bring the inbreeding in, I think it is improper.

Mr. Deuel: This is merely a hypothetical question.

The Court: I know, but there is no evidence in now as to inbreeding.

Mr. Deuel: May I have permission of the Court to put on another witness just a minute on that one point, and then recall Mr. Sanborn?

The Court: All right.

Mr. Deuel: Would you step aside just a minute.

(Witness temporarily excused.) [186]

Mr. Deuel: Mr. Rodrigues, will you take the stand, please.

MANUEL RODRIGUES

called as a witness on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Just sit down, please.

Direct Examination

By Mr. Deuel:

Q. Will you please state your full name.

A. Manuel Rodrigues.

Q. Can you talk up just a little bit so your voice will carry. And where do you live, Mr. Rodrigues?

A. Wahiawa, 2059 Hill Drive.

Q. And what has been your occupation, Mr. Rodrigues?

A. Well, I was a jack of all trade. I was with the McCandless part of the time, four years, with different bosses.

Q. Have you had experience in the cattle business?

A. Yes, I have.

Q. Working with cattle?

A. Yes, I have.

Q. And you state that you have worked on the McCandless Ranch?

A. Yes.

Q. When did you work on the McCandless Ranch? When I [187] speak of the McCandless Ranch, I am talking about the one at Makua and Kuaokala areas.

A. I worked there in 1929. I stayed there for two years and I left them because the bosses gets on a drunk all the time, so I have to work 24 to 48 hours, so it is too much for me, so I left. So I

(Testimony of Manuel Rodrigues.)

went out and then I went back again. Then I worked for John Pico, the second foreman, and then I quit because they was tracing us all the time. They think we are a bunch of thieves around there, so we can't go nowheres without they are right behind our heels, so I left them. Then Sebastian Rainy—

Mr. Anthony: I can't hear a thing this witness is saying, your Honor. May we have that statement.

The Court: About the bunch of thieves?

Mr. Anthony: The McCandlesses accusing.

The Court: Say it over again.

The Witness: John Pico accused us, not McCandless or not Mr. Marks.

(Answer read.)

Mr. Deuel: We will appreciate it if you will talk louder so everybody can hear you, Mr. Rodrigues. Will you go ahead.

A. (Continuing): So I worked under Sebastian Rainy.

Q. (By Mr. Deuel): When?

A. Well, during the blitz, or right before the blitz. [188]

Q. That is 1941? A. Yes.

Q. And then did you continue working there for a while?

A. Yes, I continued there for a while.

Q. After December 7? A. Yes.

Q. During that time were you familiar with the cattle on the ranch area?

A. I was still familiar with cattle, yes.

(Testimony of Manuel Rodrigues.)

Q. You observed them all the time there?

A. Yes.

Q. And from your observation and your past experience with cattle——

A. Yes, sir.

Q. (Continuing): ——that is, your observation of this particular herd and past experience with cattle, can you tell whether or not this herd was or was not inbred?

A. Well, most of the cattle there, they are all inbred.

Q. To any great extent?

A. So those cattle, they are very poor because the land is too dirty where it hasn't got much feed all around.

Q. The only point I want to get at right at the moment, Mr. Rodrigues, is how much inbreeding you would say there was in that herd. Was it just a small amount or quite a lot.

A. The whole thing only a few bulls, big animals; I [189] don't know what kind of a breed they are, but the cows and their calves, they were very poor.

Mr. Anthony: May I have that answer.

(Answer read.)

Q. (By Mr. Deuel): You are speaking now as of the time 1941 and early 1942; is that right?

A. Yes.

Mr. Deuel: If the Court please, I intend to go into other matters later with this witness, but I just wanted to get this evidence in so I could proceed with Mr. Sanborn, if I may recall him.

(Testimony of Manuel Rodrigues.)

The Court: All right. Did the bulls run with the herd?

The Witness: Yes, all open. They all run together.

The Court: How many bulls did they have?

The Witness: Well, all told McCandless have about 28 bulls in Makua Valley, all breeds, some white face and some bally ankle.

The Court: What do you mean by "inbred"?

The Witness: Well, small cattle because their sons mixed up with sisters and mothers, and that is what we call inbred cattle. No separate bull that comes in there every six months or a year and the same bull over and over until they drop dead.

The Court: The bull or the offspring? [190]

The Witness: McCandless is a man, he don't want you to tell him anything of those kind to take them out.

Cross-Examination

By Mr. Anthony:

Q. What were you, a part-time employee with McCandless?

A. Well, I get mad when he works with the bosses that they don't treat me right.

Q. Wait a minute. Will you listen to my questions. I asked you if you were a part-time employee.

A. Yes.

Q. You didn't work there full time?

A. Well, I worked there for four years, but part time because that is where I walked out because—

(Testimony of Manuel Rodrigues.)

The Court: What time are you talking about, his whole life or what?

Q. (By Mr. Anthony): When did you quit working for the McCandless Ranch?

A. That I didn't take the date when I quit.

Q. What year?

A. '32 I quit there.

Q. That is because you got "huhu" at the boss?

A. Yes. He get on a drunk; I have to work. I figure the animal—because it hasn't got any water, they cry all night around the ranch so a man can't sleep, so I had to go pump water at night. [191]

Q. 1932; is that right? A. Yes.

Q. And where did you go to work in 1932? What did you do in 1932 after you quit?

A. I came back to my home.

Q. To Honolulu?

A. No, in Wahiawa.

Q. Wahiawa? A. Yes.

Q. And how many years did you stay in Wahiawa? A. I living there twenty-four years.

Q. You have lived at Wahiawa since 1932?

A. 1928 I live in Wahiawa until today, so I goes to work here and there, and when I got through I go home.

Q. Well, let's see if I can get this straight. You quit the McCandless Ranch in 1932? A. Yes.

Q. Is that right? A. Yes, sir.

Q. And you left Waianae and you went to Wahiawa? A. Yes.

(Testimony of Manuel Rodrigues.)

Q. And you stayed there down to the present time; is that right? A. Yes.

Q. And what did you do for a living since you left the Waianae district? [192]

A. I would work for City and County.

Q. What job? A. Road Department.

Q. You have been there continuously?

A. Yes.

Q. You are working for the City and County now?

A. Not now. I am a retired officer from the Territory. I was a ranger for the Territory, so I am retired now.

Q. But from 1932 down to date you haven't worked for the McCandless Ranch; is that it?

A. Well, when I left there, I didn't work till the old man came and get me to go to work. I was working part time for him at Schofield Road Department under contract, and then I get through there and I move to Hauula under McCandless contract, Road Department.

Q. Was Linc putting up a road there in Schofield?

A. Yes, Government road, Federal Government road.

Q. Did Mr. McCandless have a job at Wahiawa?

A. No, in Schofield.

Q. Well, now, after Linc died—do you remember when the old man died? A. Yes, sir.

Q. Do you know whether or not any new bulls were brought in?

(Testimony of Manuel Rodrigues.)

A. No, not when McCandless died, I haven't seen any. [193]

Q. You don't know anything about that?

A. No.

Q. You wouldn't know whether new stock was brought in or not?

A. No, the only stock was brought from wild stock from Hawaii, Kona, that is, McCandless; that is all that was brought there.

Q. Well, is it accurate to say that what you testified to is based upon what you learned in 1932; is that right? A. Yes.

Q. What you knew about it? A. Yes.

Mr. Anthony: That is all.

Redirect Examination

By Mr. Deuel:

Q. Mr. Rodrigues—— A. Yes.

Q. I want to clarify this. Mr. Anthony has intimated that you were not familiar with the cattle out there after 1932. Will you again tell us whether or not you were actually familiar with those cattle later than 1932.

A. Later, yes. I went back there. I was familiar.

Q. You were on the ranch?

A. On the ranch.

Q. In 1941 and 1942? [194]

A. Yes, sir.

Q. And you observed the cattle at that time?

A. Yes, sir.

Q. And from your observation of those cattle

(Testimony of Manuel Rodrigues.)

at that time, at the time the war broke out, do you know whether or not the herd as a whole was of cattle which were inbred?

A. Yes, I do. They were all inbred.

Q. They were highly inbred? A. Yes.

Mr. Deuel: That is all.

Recross-Examination

By Mr. Anthony:

Q. You went out there as a visitor; is that right?

A. No, sir, I was working for McCandless at the time under Sebastian Rainy.

Q. I mean after you left in 1932.

A. After I left there, I went away and then when I got through with McCandless, I went to work for City and County. I went right back to Makua again, under McCandless' invitation. I went to work for him.

Q. Then you returned to the ranch?

A. Yes, I returned.

Q. After 1932; is that right? A. Yes.

Q. And what year was that that you went back?

A. That I don't remember.

Q. Was it in 1941?

A. Well, that is the third time I went back. I went back in 1932 and I worked back under Sebastian Rainy.

Q. How long did you stay there the last time?

A. I stayed there till after the blitz for a little while; then I left there. I got hurt.

(Testimony of Manuel Rodrigues.)

Q. Were you on the pay roll at the time of the blitz?
A. Yes.

Q. Full time?
A. Full time.

Q. Now, do you know whether or not any new bulls had been brought in?

A. No, not at all.

Q. Well, do you mean that none were brought in or you don't know?

A. I have been there all that time, I haven't seen any come. If they do come, either they haul it by rails or by truck. I haven't seen any.

Mr. Anthony: No further questions.

Mr. Deuel: That is all, Mr. Rodrigues.

(Witness excused.)

Mr. Deuel: Will you take the stand again.

PERCY D. SANBORN

resumed the stand and testified further as follows: [196]

Mr. Deuel: Your Honor, I submit that we now have evidence of inbreeding and that my question is proper.

The Court: All right.

Direct Examination

(Continued)

By Mr. Deuel:

Q. Do you still have in mind the question that I asked you, Mr. Sanborn, just before the objection?
A. No, I would like to have it repeated.

(Testimony of Percy D. Sanborn.)

Mr. Deuel: Would you reread that question.

The Reporter (Reading): "Q. And now, Mr. Sanborn, based upon your experience in this field and your knowledge of cattle values, relating back to early 1942, assuming that you take a herd of cattle that are of the scrub type, considerably inbred, some tuberculosis existing in the herd, many of the cattle being quite wild, they being scattered, or ranging over a fairly large area of land, such as the area that you are familiar there with, the Kuaokala and the Makua areas, and also many of them up into the forest reserve areas, can you give us what your estimate of the fair value, on the average, of those cattle would have been to a purchaser who had to go in and take them on the hoof, so to speak, or on the ground as they existed there, not being brought up into a corral."

The Witness: Do you want a dollar-and-cent answer [197] to that?

Q. (By Mr. Deuel): You have that knowledge, first?

A. Based on beef and the fact that I were going to buy them fat, I would offer \$45 a head under the question asked.

Q. I didn't quite get your answer. You say that you would——

A. I would, in buying, assuming the cattle are what they are described in the question, I would offer \$45 per head, because I would be buying them as feeder cattle.

Q. Now——

(Testimony of Percy D. Sanborn.)

The Court: You would offer that for them on the range, and you recover them?

The Witness: Yes.

Q. (By Mr. Deuel): So that it, you consider, would be a fair value, as the question was put to you, in 1942 for that type of cattle?

A. I would be willing to offer that, as the question was, assuming there was some tubercular.

Q. Yes.

A. Under that circumstance I would have been willing to have paid \$45 a head.

Q. What I am wanting to know, is that what you would consider to be a fair value for those cattle in that condition at that time? [198]

A. Yes. That, naturally, based on the fact that you have a normal herd, cows, calves, bulls.

Q. Just take an average?

A. Yes, average cattle range.

Mr. Deuel: You may cross-examine.

Cross-Examination

By Mr. Anthony:

Q. Mr. Sanborn, what would you estimate would be the cost of catching cattle that have been dispersed over an area such as this?

A. Rather hard to estimate that, but I would contract it to different fellows who probably were familiar with the area at \$10 a head delivered into the corrals.

Q. That is a fair and reasonable price for the

(Testimony of Percy D. Sanborn.)

catching of cattle that have been dispersed over an area of 4,700 acres such as this?

A. At that time I would have been willing to have offered anyone—they supply all their own equipment; I will take the cattle in the corrals alive.

Q. Now, Mr. Sanborn, what was the condition of the market in regard to the purchase and sale of cattle on the hoof in July of 1942, or in the early part of 1942? A. Very strong.

Q. There were plenty of people, were there not, butchers and others, who were willing to go right out and buy a steer [199] or a calf right on the hoof; isn't that right? A. That is correct.

Q. No difficulty of disposing of them?

A. No, no trouble on that.

Q. How about these restaurants? Would they buy cattle in that condition, on the hoof?

A. They would buy where there was—during that first six months there was an awful lot of buying by all types of people.

The Court: Well, what do you mean "on the hoof"? That doesn't convey to me very much information. Cattle generally are on the hoof while they are alive. Do you mean on the range or in a corral?

Q. (By Mr. Anthony): You would have to get them in a corral, wouldn't you, to sell them to a butcher or restaurant keeper; is that right?

A. Yes.

Q. Now, would some of those people fatten up the cattle after they got them?

(Testimony of Percy D. Sanborn.)

A. No, they wanted them slaughtered immediately.

Q. Slaughtered right away; is that right?

A. That was my experience with these buyers.

Q. During this period what do you estimate the fair market value of the Kahua cattle to be per head?

A. What would I have estimated them?

Q. Yes. You said these are worth \$45 a head; what would the Kahua cattle be worth?

A. I wouldn't have sold—if I had had the authority I wouldn't have sold the whole Kahua herd for less than \$75 apiece.

Q. How much?

A. \$75 apiece. I wouldn't have taken anything less, if I had the authority.

Q. How much did Kahua get for them?

A. Well, you have a pencil, 500-pound average times an average price of about 22 cents. About \$110. That is based on what we normally would kill in a year's time during that period of time, I mean cows, bulls and steers and heifers. We generally would average out about a heifer price.

Q. Was that the going price of beef the first part of 1942, twenty-two cents a pound?

A. That was the price of heifers.

Q. Twenty-two cents?

A. For heifers, yes. Steers were a half cent higher. That was all Government controlled price.

Q. There wasn't any OPA in 1942, was there?

A. Well, it was the office of some administration.

(Testimony of Percy D. Sanborn.)

Q. It was the generals over here; did they fix the price of beef at wholesale?

A. The Government did. I don't recall which agency [201] it was, but there was Government control.

Q. Are you sure of that, Mr. Sanborn? I think you are mistaken; that is why I asked you. Didn't the OPA come in later?

A. I am not sure. I would have to go back over my records, but we had Government control, whether it was Territorial, Military Governor, or Uncle Sam.

Q. I am talking about the first six months of 1942. Do you think you had Government control then?

A. We had some sort of Government control.

Q. And there wasn't any great amount of beef imported during that period, was there?

A. Not to my knowledge there was not.

Q. Any cattle imported into Hawaii?

A. I wouldn't know.

Q. Well, what is your best information on that? You are a cattle man. Were there cattle being brought into these islands the first six months of 1942?

A. I really don't know.

Q. Well, you know the shipping situation, don't you?

A. Yes, I realize that, and I assume there weren't any the first six months of the war. I was too busy otherwise to keep track of that.

Q. Mr. Sanborn, the small buyer and restaurant keeper that was in the market trying to get beef in

(Testimony of Percy D. Sanborn.)

the early part of 1942, do you think that he would have paid a higher price [202] than \$45 a head for these cattle in a corral on the hoof?

Mr. Deuel: Objection to that question, your Honor. His statement regarding \$5 was not in the corral; it was if the cattle were scattered all over the ranch, and Mr. Anthony is suggesting now that the \$45 he has talked about is in the corral. We are getting at two different things.

Mr. Anthony: The difficulty with that evidence, your Honor, is they are trying to charge us for having destroyed the fences. It was because of the activities of the Army that they were scattered all over. That is not our fault. We had an operating ranch until the Army cut it all to pieces.

Mr. Deuel: There has been no evidence that cattle were in corrals, your Honor. I believe the evidence is that cattle were ranging throughout the area. The evidence is very clear that they had access up into the Kuaokala area because there was no fence along the borderline.

Mr. Anthony: The evidence is the Army destroyed the paddocks and the corrals.

The Court: I don't think any answer the witness could give to that question would be very informative to me. Restaurants and people of that kind wouldn't buy a flock of cattle. It isn't likely that they would, unless they had some place to keep it.

Mr. Anthony: I think that is correct, your Honor. [203]

(Testimony of Percy D. Sanborn.)

The Court: From any beef cattle in a corral they would want to pick out just the particular ones that they wanted. Taking the cattle as a whole, from calves to heifers, to brood cows and bulls and steers, and what not, what some restaurant would pay for some head of stock in the corral wouldn't mean anything to me in fixing any value.

Mr. Anthony: I will withdraw the question, your Honor.

Q. (By Mr. Anthony): Mr. Sanborn, the sixteen cattle that you found tubercular—I believe you said there were 16 out of 204; is that correct?

A. That is what I said.

Q. Do you know where those came from; I mean, what part of the McCandless Ranch they came from?

A. No, I don't. Sometimes they would tell me what section they were from and other times they said, "We have a load of cattle," and they would bring them in.

Q. You wouldn't know whether or not——

Mr. Anthony: Withdraw that.

Q. (By Mr. Anthony): Did you know about the experiments that the McCandless Ranch was conducting at Waimalu, feeding up of scrub cattle?

A. Yes, I do.

Q. Do you know whether or not any of this 204 that were slaughtered during the period that you testified about came [204] from Waimalu?

A. I don't think they did. I would like to check my records, But as I recall——

(Testimony of Percy D. Sanborn.)

Q. Can you do that now? Or, you don't have that available?

A. I don't have my books with me.

Q. I see.

A. I think they came in before the blitz. I recall going through my records yesterday and noticing we had killed some, and I think they were prior to that date.

Q. Well, this 204 were between January 1 and July, is that right, of 1941?

A. Including July.

Q. 1941? A. No, 1942.

Q. 1942? A. Oh, I see.

Q. What was it you said came in before the blitz, Mr. Sanborn?

A. You asked me about the experiment conducted at Waimalu and about the cattle that were slaughtered from that experiment.

Q. Yes. You think that was done before the blitz?

A. As I recall, they did. I wouldn't want to be held to that specifically. [205]

Mr. Anthony: No further questions.

Redirect Examination

By Mr. Deuel:

Q. Mr. Sanborn, Mr. Anthony asked you about what you would consider at that time the average value of your Kahua cattle, and you stated it would be \$75. When you were talking about that, you

(Testimony of Percy D. Sanborn.)

were speaking of your cattle in the corral; is that correct?

A. Yes, and based upon the fact that we had to liquidate and we were selling them, not as any breeding stock, but just as beef cattle, as if they were all going to market.

Q. The whole herd as a whole?

A. That's right. But I am putting myself in the same position if somebody asked me to buy a bunch of cattle and I had my own ranch, I wasn't interested in breeding any of them, I just wanted to buy them on the basis that I would make some money by killing them, and only on that basis would I have considered Kahua cattle at that price. Otherwise, I would naturally have asked an awful lot more.

Mr. Deuel: That is all.

Recross-Examination

By Mr. Anthony:

Q. In other words, you are talking about having to sell them all in one "fell swoop"; is that right?

A. That's right. [206]

Q. What would your price be, what would your figure be, if there were an orderly marketing of those cattle over a period of years.

Mr. Deuel: If the Court please, I don't believe that question gets to our question here. What we are interested in is what the value is of the herd as a whole, which is assuming an over-all sale of the

(Testimony of Percy D. Sanborn.)

whole herd, not the marketing of them piecemeal, or a few at a time. I object to the question on that ground.

The Court: Well, you opened the way there.

Mr. Anthony: That is not just compensation for sale.

The Court: Go ahead.

Mr. Anthony: Did you get the question, Mr. Sanborn?

The Witness: In other words, as we are now marketing in normal procedure of marketing?

Mr. Anthony: Yes. You stated at the end of your redirect examination to Mr. Deuel that the reason you put \$75 a head was that all you were going to use them for was to kill them and sell them; if you were going to market them or use them in the ordinary, normal course of business, if you were the owner, you would ask for a great deal more, as I understood your testimony.

Mr. Deuel: Your Honor, it is understood that this answer must relate to value in the early part of 1942, the time we are talking about. He is talking about marketing them [207] over a period of time which would run on for several years, and if prices varied at a later date, that would put a different complexion on the matter.

Q. (By Mr. Anthony): Do you understand my question? A. Yes.

Q. What would your answer be?

A. Just to verify that \$75 figure I put on.

Q. I can't hear you.

(Testimony of Percy D. Sanborn.)

A. To verify the \$75 under liquidating the whole herd.

Mr. Anthony: I don't get that first word.

(Answer read.)

The Witness: To verify the \$75 which I answered to Mr. Deuel, was on the basis of liquidating the herd, everything.

Q. (By Mr. Anthony): In other words, for sale in one "fell swoop"?

A. That's right. Under our normal marketing conditions Kahua has averaged 500 pounds, everything slaughtered, and I believe in 1942 that we still averaged 500 pounds, cows, all sexes, slaughtered under our market procedure, and I would judge, not having actually calculated out or gone back over any annual reports, I used to find that the heifer price was generally about the average price we got, average price per pound, so approximately \$110 is what we would have received for approximately about 1,200, 1,500 head of cattle.

The Court: Are you thinking now about the cattle [208] that you raise on Hawaii or the cattle you raise out here on Oahu.

The Witness: Well, it would include any and all cattle that we raised ourselves, whether we fatten them on Oahu or whether we fatten them on the main ranch.

Q. (By Mr. Anthony): Your main ranch is the old Frank Woods Ranch at Kohala; is that right?

A. Yes.

(Testimony of Percy D. Sanborn.)

Q. And you have fattening pastures down here on Oahu? A. Yes, we do.

Q. When you answered your hypothetical question of a herd wandering on an open range of some 4,700 acres, and, in response to Mr. Deuel's hypothetical question, you valued the herd at \$5 per head, that was again upon the assumption that there was a forced sale all at one time, is that right, just like you said that the Kahua was \$75; is that right?

A. Well, I would assume that the party was eager to sell his cattle if he came and asked me to buy his herd. Whether it would be a forced sale or not, I wouldn't know. I would assume he wanted to liquidate his herd and was trying to shop around and get a price. My offer would be such-and-such, because if I really knew he was being forced out of business, or something, I may "play smart" and start at \$10, and we would probably end up compromising. I am taking an assumption that the man wants to get rid of his cattle. He [209] may have some other plans for his land, I don't know.

Mr. Anthony: No further questions.

Mr. Deuel: No further questions. That is all, Mr. Sanborn.

(Witness excused.)

Mr. Deuel: Mr. Korte.

KARL HENRY KORTE

called as a witness on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Just sit down, please.

Direct Examination

By Mr. Deuel:

Q. Mr. Korte, will you please state your full name? A. Karl Henry Korte.

Q. And your residence and occupation.

A. I live at 3033 Oahu Avenue, Honolulu, and I am a forester by profession.

Q. And for whom do you work, Mr. Korte?

A. Territory of Hawaii Board of Agriculture and Forestry.

Q. And have you been with the Board of Agriculture and Forestry as a forest ranger for some time?

A. I was an assistant forester for nine years. I never was a forest ranger. There is a difference in grade.

Q. You have been working in the forest areas though? [210]

A. It will be nine years the first of March.

Q. What would that be when you started, what date? A. March 1, 1941.

Q. March 1, 1941. Do your duties take you out into the forest areas for inspection and so forth?

A. That's right.

Q. After you started with them in March of

(Testimony of Karl Henry Korte.)

1941, did your duties take you out into the areas which are shown in blue on the exhibit here before you, which are out in the McCandless Ranch areas, in the Makua and Kuaokala area?

A. That's right.

Q. And how frequently would you go into those various——

A. Approximately once a month. Up to the time of the blitz I was there as least eleven times, from March to the blitz.

Q. And were you there any after the blitz?

A. I was there once after the blitz.

Q. And during that time did you make inspections of the area? A. That's right.

Q. Particularly of the forest area?

A. That's right.

Q. Going to the Makua area, and the part within the lease area, which is outlined in blue, then toward the mountains from that and surrounding it is the Makua Forest area? [211]

A. That's right.

Q. Can you state whether or not you inspected the fences that were along the boundary, forest boundary area, separating it from the lease areas?

A. That's right.

Q. And will you state what you found to be the condition of that fence. A. What fence?

Q. The fence between the Makua Ranch and Makua Forest Reserve area. Will you state what the condition of that fence was, as you found it.

A. The fence was in very poor condition. There

(Testimony of Karl Henry Korte.)

was never, practically, any maintenance work done as far as nailing up new wires, replacing old posts. The gates were in poor condition. Sometimes they were left open. The cattle were ranging in and out between the forest land and the ranch land.

Q. Both through the gates and through the fence itself?

A. Yes. The main gate was open on the 11th—I mean on the 28th of November, 1941. That gate was open, wide open, and cattle were ranging back and forth.

Q. What I am getting at, in addition to the gates whether or not the fence in general was in a stock proof condition.

A. No, it was not in a stock proof condition.

Q. Would you say that condition existed right on up to the time of the war? A. That's right.

Q. At times you were out there, Mr. Sanborn, did you—You state that the 28th of November cattle were ranging through the fence there; did you find cattle ranging around in that Makua Forest area? A. Yes.

Q. How extensive was that?

A. Well, they ranged all over the area. They even went up to the palis on these nose ridges, up to the edge of the tree ground. I found one—not one, but several head of cattle, they must have been at least 400 feet above the bottom of the valley up on these noses. They ranged all over.

Q. That condition had existed, you say, ever since March when you first went out there?

(Testimony of Karl Henry Korte.)

A. That's right.

Q. Did you ever take this matter up with representatives of the McCandless Estate?

A. Yes, I talked to who I presume was the foreman and told him the cattle was in there and if they couldn't make an effort to get them out, but to my knowledge no effort was ever made.

Q. Did you, in looking around there and inspecting that and seeing the cattle, have a chance to observe the nature [213] of the cattle; I mean, type of cattle? Were they domestic, wild cattle among them, or what?

A. In my estimation they were rather wild. Every time you came near them or disturbed the bunch, they took off.

Q. Now, getting to the other area there, up on the Kuaokala area, did you also inspect the forest reserve area there and the boundaries of the area?

A. Yes, I did.

Q. Will you tell what the condition was, whether or not between the area labeled here Lease No. 1741 and this Kuaokala Forest Reserve area there was a fence existing?

A. There was no fence—there was a fence here, but there never was any fence, to my knowledge, on the Kuaokala Forest Reserve.

Q. For the record, you are pointing out that there was no fence between the area labeled Lease 1741 on this map and the Kuaokala Forest Reserve?

A. Yes.

(Testimony of Karl Henry Korte.)

Q. And did you find cattle ranging in that forest reserve area? A. Yes.

Q. And you are speaking of this same period of time? A. Yes.

Q. And were those cattle the same type you found in the Makua area? [214]

A. To me they looked about the same type.

Q. I want to ask you another question with regard to the map here. This fence that you pointed out as being on the boundary between the Kuaokala Forest Reserve and what is labeled the Mokuleia Forest Reserve, do you know who that fence belonged to?

A. I am not positive whose it was, who built that or whose it was. That was before my time. I know there was a fence here (indicating).

Q. You wouldn't know the owner of those fences? A. No.

Mr. Deuel: You may cross-examine.

Cross-Examination

By Mr. Anthony:

Q. When were you out there last?

A. The last time I was out there was in March of 1942.

Q. When did you join the service?

A. March 1, 1941.

Q. And when did you go out there in 1941?

A. May I refer to notes?

Q. Yes.

A. We keep a work diary, what we did every

(Testimony of Karl Henry Korte.)

day, in a working day. Which area are we talking about now, the Makua area?

Q. Yes, the area you are talking about; when did you [215] first go out there?

A. Makua Valley I went on the 18th of March, 1941.

Q. Anybody else with you? A. No, sir.

Q. March 18? A. 1941.

Q. When did you go out in that district again, McCandless property?

A. I went on April 25, 1941.

Q. April 25? A. 1941.

Q. Yes.

A. I reported that there were cattle in the forest to the McCandless Ranch at that time.

Q. That was at Makua? You went to Makua?

A. Yes.

Q. All right. What was the next visit?

A. Then on May 11, 1941, I again talked to I presumed was the foreman.

Q. Where did you go on May 11, 1941?

A. Beg pardon?

Q. Where did you go?

A. Up into the forest area.

Q. What lands? A. In Makua Valley.

Q. And when did you go out again?

A. And I made another inspection on the 2nd of May, 1941, the 19th of June, the twenty—I believe this is the 22nd of June, the 22nd of July, the 11th of July, the 22nd and 27th of August, the 4th

(Testimony of Karl Henry Korte.)

of August, the 11—I mean the 28th of November, and the 2nd of March, 1942.

Q. Wait a minute. The last one was the 28th of November? A. Yes.

Q. The last one in 1941?

A. And the 2nd of March, 1942.

Q. Now, these dates that you have given us are all with respect to visits that you made to the McCandless ranches in the Waianae District?

A. Only the forest reserve. I mean on those dates I was in the forest reserves.

Q. You understand what we are talking about here? A. Yes.

Q. The boundary of the McCandless lands.

A. Yes, between the McCandless land and the forest boundary.

Q. Yes. A. Yes.

Q. I don't care whether you were in the forest. We want to know whether or not you were along the boundary of the McCandless land and the forest reserve. [217] A. Yes, I was.

Q. Is that where you were? A. Yes.

Q. Do you know Mr. Max F. Landgraft?

A. Yes.

Q. Who is he?

A. He is associate forester on this island and the Territory.

Q. Is he one of your subordinates?

A. No, he is my superior.

Q. Did he ever go out there?

(Testimony of Karl Henry Korte.)

A. I think he went with me one time. I don't know what date that was.

Q. Have you had occasion to examine the records in the files of the Board of Agriculture before testifying?

A. My own records, my own diary.

Q. And you say you were there on—were you there on March 11?

A. No, I didn't say March 11.

Q. I am asking you if you were there. You said you were up on March 18.

A. That's right.

The Court: You said you were there on March 11, 1942.

The Witness: That was March 2, 1942. [218]

The Court: Yes.

Q. (By Mr. Anthony): Would you say that the Mokuleia Forest Reserve fence was in excellent condition on March 11, 1941?

A. Which part of the fence do you mean, the one across Kuaokala?

Q. Well, you examine that map there.

A. Yes. Do you mean—You see, there is a fence completely around. There is a fence.

Q. Where that joins the McCandless land.

A. That is right here (indicating). Yes, that fence was in fairly good condition.

Q. And how about the rest of this fence over here (indicating)? You said this was where it was broken down. Where did you say the fence was not in good condition?

A. It is up in this section here (indicating), I

(Testimony of Karl Henry Korte.)

believe it was. You could drive up this road part ways, then walk. It is this section (indicating) I am talking about.

Q. And what was the condition of the fence there?

A. It was in poor shape. It needed a lot of maintenance work. Wires were loose. I don't mean the fence was completely down, but wires were loose and quite a number of the posts were decayed.

Q. When was that?

A. All during my inspection trip. [219]

Q. Well, I mean was there no work done at all?

A. Not to my knowledge. There might be occasionally a wire nailed on, but to my knowledge there never was a real maintenance job done.

Q. Are you a trained forester?

A. Yes, sir.

Q. Where did you receive your training?

A. Louisiana State University.

Q. What did you do before you joined the department?

A. I was in the CCC's.

Q. Here on this island?

A. No, on the island of Hawaii.

Q. As a forester?

A. As a foreman and as a project superintendent.

Q. Did you see any work going on there, cutting the Makua Valley up into paddocks?

A. That I wouldn't know. I never paid attention what went on on private lands. I don't remember what they did on the private lands.

(Testimony of Karl Henry Korte.)

Q. Well, wouldn't you naturally observe that if you would see working parties?

A. You would see fences and what not, but I wouldn't know what was going on, see.

Q. So far as you know, you didn't see any working parties; is that it? [220]

A. I wouldn't say that here. I might have and I might not have, because I didn't pay any attention to anything that went out on the private lands.

Q. Well, if there had been any working parties on the boundary fence, you would have noticed that?

A. Yes, I would have seen them.

Q. You never saw any working parties?

A. No, not on the boundary fence.

Q. Or on the adjacent paddocks?

A. That I don't know on adjacent paddocks.

Mr. Anthony: No further questions.

Mr. Deuel: That will be all unless the Court has some questions.

The Court: No.

Mr. Deuel: You may be excused, then, Mr. Korte.

(Witness excused.)

Mr. Deuel: I would like to recall Mr. Rodrigues to the stand now, your Honor.

MANUEL RODRIGUES

recalled as a witness on behalf of the defendant, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Deuel:

Q. You have already been sworn, Mr. Rodrigues. Will [221] you try to keep your voice up a little bit.

A. Yes.

Q. You will probably recall when you were sitting back there it was a little difficult to hear Mr. Sanborn. I believe you have already stated that for a period of many years you were familiar with the McCandless Ranch areas out there at Makua and Kuaokala.

A. Yes.

Q. And you were there working from time to time through 1941 and for a while into 1942; is that right?

A. Yes.

Q. During the time that you were there, right late, 1941, and around the time of the outbreak of the war, December 7, 1941, did your duties take you up so that you would have any occasion to observe the fence area between the Makua lands and the Makua Forest Reserve?

A. Well, in the forest reserve since that the Board of Forestry haven't got nothing to do with the forest fence there, the agreement with McCandless that they supposed to repair the fence.

Q. I understand that. What I am getting at, Mr. Rodrigues, and I will refer you on the map

(Testimony of Manuel Rodrigues.)

here, Can you see this area—Can you see this all right or do you have trouble? I am speaking of the fence between the upper end of the Makua Ranch and the forest reserve on up above it. Do you recall [222] that there was a forest reserve up above that?

A. There is a fence from a water trough runs up, comes through Koiahi and then up to that other portion, we call it—I forget the name now. Well, that fence was in good order, because I repair that fence when I was there.

Q. What I am talking about——

A. But the forest fence very poor condition, very poor fence.

Q. You do recall—You know which was the forest boundary fence?

A. Yes, when I was a ranger I used to go there time after time.

Q. You state that that fence was in poor condition? A. Very poor condition.

Q. Can you state whether or not that fence was in that condition at the time, late in 1941, about the outbreak of the war?

A. It was still the same.

Q. Was it in a stock proof condition, or could cattle get through it?

A. Cattle could walk in and walk out.

Q. Did you observe whether cattle did go into that forest area?

A. There was cattle going in and out there be-

(Testimony of Manuel Rodrigues.)

cause the fence—those cattles when they put their head in through the [223] wire they walk right through.

Q. So that you know at that time, at the time of the outbreak of the war, there were a number of the McCandless cattle up in that Makua Forest area; is that right? In the Makua Forest Reserve area?

A. There were, yes.

Q. And speaking of the Kuaokala area now—

A. Yes.

Q. Up on the plateau there, you know there was a forest reserve area up in there, too, do you not?

A. Yes, I built that forest fence when I was with the ranger, CC foreman, anyway.

Q. That is not the particular fence I am talking about.

A. That is all in Dillingham's.

Q. If you look closely, can you see this map?

A. I can't see.

Q. You say you can or can't?

A. No, I can't see it.

Q. Now, getting back to the condition of the cattle on the McCandless Ranch, you said you were familiar working with those cattle.

A. Yes.

Q. You had worked with cattle and had experience with cattle for quite a number of years? [224]

A. Yes.

Q. While you were working there in 1941 and 1942, you observed those cattle, did you not, so that you know what they were like?

A. Yes, I observed them, because they are very poor, they are dying one by one or two by two.

(Testimony of Manuel Rodrigues.)

Q. Did you observe them closely enough to know whether any of them, or any appreciable number of them, were infected with tuberculosis?

A. Most of them tuberculosis, yes.

Q. Well, would you say that there were quite a few of them that had tuberculosis or just a few?

A. About 25 per cent.

Q. Of the general herd?

A. Whole area of Makua.

Q. And you have already testified regarding the fact that the cattle were inbred. Were the cattle there what is generally known as scrub type cattle?

A. Yes, sir.

Q. Now with regard to cattle which were ranging out into the forest area, can you tell us whether or not you observed whether those cattle were tame or wild; would they be easy to catch there?

A. Some there without a brand. When there is any cattle in the forest without any brand, they call those the [225] wild cattle.

Q. Well, did you make efforts to try and get some of those cattle?

A. Yes, when I was a ranger I always—Old Man Mr. McCandless always send me there to get after the boys to get them out. We gets them out and then different herds go inside the forest and stayed there.

Q. Now you have stated that you were in the area there for a while in 1942. A. Yes, sir.

Q. And that was after there had been a few Army troops come in?

(Testimony of Manuel Rodrigues.)

A. Well, very few there, just one captain with, I think it is about 35 men, that is all.

Q. In which area was that?

A. They were living just opposite Marks' ranch house. There was a little open field. And some down to the other end of Makua where the railroad section was, where they are living on the beachside. That is all.

Q. Those that were up on the Makua side of the railroad?

A. Right in the town of Makua, back of Makua Church, a little open field. They were there camping there.

Q. Did they go very far back up into the valley?

A. When I was there I had to report to the captain, so when they moves out we get scared going round looking at [226] water troughs, we might find shot around. They have to keep them out of the range all the time and there was strict orders not to go in the range when I was there, because we was scared to go looking for the water trough.

Q. You say the troops did or did not go up in the range?

A. Well, they sneak off and take a gun with them and see any goats around the range they take a shot at them.

Q. You are speaking of individual soldiers?

A. That is all, they go and they send a guard after.

(Testimony of Manuel Rodrigues.)

Q. There has been some evidence in the case when you weren't here to the effect that the McCandless cattle were kept away from the water supply there in the area. Did you observe anything in that regard? A. Not when I was there.

Q. Did you notice whether or not cattle had access to the water? Were they able to get to the water?

A. I take care of the water trough every day. I goes to Keawaula and take care of that water trough and come back to Makua and take care of those, because we didn't have enough men to work. One man had to go to Waianae and some have to cut grass.

Q. You saw that the cattle actually were able to get the water?

A. Yes, they get their water. [227]

Q. In the Makua area there do you know anything about the construction in 1941 of some cross fencing to divide that up into four paddocks?

A. Well, that fence back of Makua up to Koiahi range, there is a hill there—we call it Koiahi—and that fence was completely in good order. We had that repair before the war.

Q. I am talking about fences which broke that Makua area up into four paddocks. Did you know they were building them?

A. Way down there is no fence at all. They come and go. Upper, this portion of the land, they have a fence there, but the gates were all wide open. The cattle can go back and forth.

(Testimony of Manuel Rodrigues.)

Q. Now, you had been out there quite a lot for a period of years. Did you ever observe before the war whether or not any of the McCandless stock got out onto the railroad right-of-way?

A. Well, if they get out on the railroad right-of-way, the Army or anybody has nothing to say with it, because it is the railroad fence and McCandless——

Q. I am asking you about the time before the war ever started. Did cattle ever get out there, cattle or horses?

A. Oh, yes, they did.

Q. Now, from your observation out there in 1941, early 1942—1941 and early 1942, do you know anything about there [228] being some pigs there that belonged to the McCandless Estate?

A. Yes, they have.

Q. How were those pigs kept up? Can you tell us something about those pigs?

A. Very poor feed. They only give them middling and water, that is all. That is all what they eat.

Q. What and water?

A. Middling.

Mr. Anthony: Middling?

The Witness: Middling, two times a day.

Q. (By Mr. Deuel): Was that enough for the pigs to eat or did the pigs have to range around?

A. No, that ain't enough.

Q. The pigs were scattered all over?

A. They come in the morning and eat, then they goes out open field. When they ring a bell in the **afternoon, they come back and get something to eat. They come back and then gone again.**

(Testimony of Manuel Rodrigues.)

Q. Do you have any idea, just roughly, how many pigs there were there?

A. There were about 150 in total, that is, the mother and little ones.

Q. That is counting all the pigs? A. Yes.

Q. Mr. Rodrigues, there was another McCandless ranch, [229] I understand, down around Waianae, that is, near Lualualei, in that area. Did you ever have occasion during this time, in 1941 and early 1942, to go down around there? A. Yes, sir.

Q. Did you work there some, on occasion?

A. We used to go out there and get cattle out of the plantation ground because it goes in there and eat cane, so we had to go and get them out.

Q. Outside the McCandless Ranch?

A. Outside the Government road in the plantation ground.

Mr. Anthony: I object to this. It is not relevant to any issue here.

Mr. Deuel: I understood that Mr. Marks testified, your Honor, that there were 30 head of cattle lost in this area. Am I mistaken?

Mr. Anthony: No. That is right.

Mr. Deuel: It has nothing to do with getting into the plantation. What I am leading up to, your Honor, is that their fence in this area was not in stock proof condition. It does have to do with their loss. If the cattle had been wandering out there before the Army ever came in, the Army is

(Testimony of Manuel Rodrigues.)

not responsible for the fact that cattle were outside the ranch area there.

Th Court: Well, I assume you are just asking this [230] one question.

Mr. Anthony: I will withdraw the objection.

Mr. Deuel: That is as far as I was going on that.

The Court: All right.

Q. (By Mr. Deuel): Mr. Rodrigues, in that area we are talking about, the same area you have spoken of where the cattle got out on the plantation——

A. Yes.

Q. (Continuing): ——did you observe what the condition of the McCandless fence was along the boundary there?

A. Well, it is all poor fence, because they have a regular one wire. We nail a stave. That stave between it has rubber branches to put in between, gets rotten any time.

Q. Just before and up to the time the war broke out, was that fence in a stock proof condition or not?

A. No, it was still the same. There was only one fence. Marks can say that because there was a hog wire fence and the other side of that fence it is a straight wire.

The Court: How many wires high?

The Witness: Five wires.

The Court: All right.

The Witness: Would be, according to the law, 6-foot fence.

Mr. Deuel: You may cross-examine. [231]

(Testimony of Manuel Rodrigues.)

Cross-Examination

By Mr. Anthony:

Q. Did you ever go up to Kuaokala after the outbreak of the war? A. Yes.

Q. Did you see the pipe that was cut by the soldiers, the water pipe?

A. No, I haven't seen that.

Q. Was there a water pipe cut up there?

A. Well, the pipe was all rotten. The water leaks, were leaks there, that is all. They didn't have nobody to repair for it. If the Army put it in, why they must have repaired to to save the water. That I don't know.

Q. Did you see a cistern up there?

A. I don't know.

Q. You don't know whether there was any cistern there at all? A. No.

Q. At Kuaokala? A. No.

Q. You don't know that? A. No, sir.

Q. Did you see any Army trucks go back and forth over the McCandless Ranch?

A. Well, in Makua there they are, but not Kuaokala [232] because trucks can't get there.

Q. In Makua, though?

A. Yes, but they run as far as the middle fence, that is all. They can't go up any further.

Q. You noticed that the fences were cut down, but by the Army? A. Not in my time.

Q. Not in your time?

(Testimony of Manuel Rodrigues.)

A. Not in my time, because there were only a few men and nobody cut the wire. After I left there they might do it, I don't know.

Q. When did you leave?

A. After the blitz I left there.

Q. You left on December 7, didn't you?

A. I was there. I was working before that.

Q. Did you leave the following Monday?

A. After that I left, I think, in March or April. Then I left there. I get hurt and I came to town and nobody take care of me. They won't pay my bills of my eye, not even my salary, so I quit again.

Q. How did you get hurt?

A. Algaroba trees. I was chasing wild cattle, got hit.

Q. You were injured?

A. Yes, I came in to see the doctor. Rang up the [233] driver, so they absolutely refused to come and get me to go to town, so I came myself; not Marks, I don't know those things, but it was under his supervisor man, Matthew; they refused to come and get me to bring me to town.

Q. You were under Workmen's Compensation, weren't you?

A. I suppose yes; I suppose so. I don't know.

The Court: I don't believe domestic servants and farm laborers come under Workmen's Compensation.

Mr. Anthony: Well, the practice varies, your Honor. Some of them are covered, whether the

(Testimony of Manuel Rodrigues.)

statute requires it or not, by insurance policies.

The Court: Oh.

Mr. Anthony: Many concerns do, I know that.

Q. (By Mr. Anthony): Who was it refused to come and get you?

A. Matthew. Matthew Kali. He was the man driving for McCandless as a driver.

Q. Did you ever ask anybody to pay your doctor's bill?

A. Well, Dr. Trexler, he says he will do that, see, because I couldn't able to see, so he send me home under care.

Q. You figure you have not been used too well by the McCandless Ranch; is that right?

A. Yes.

Q. You think they haven't treated you right?

A. I guess Marks haven't heard, though, so it is up to Matthew. If Marks ever heard, he might treat me in a fair way, but I don't think he knows anything about it.

Q. Now, you left there in you say March or April?

A. Yes.

Q. You said one of the fences was in bad condition and one was in good condition?

A. Yes.

Q. Can you give us the location of where the fence was in bad condition?

A. It is about a mile from Makua railroad track. That is right there Marks ranch house to the middle gate. From there up to Koilahi that fence is completely good, because we had it repaired before the

(Testimony of Manuel Rodrigues.)

blitz came in. We repaired it, put new posts and new wires, everything.

Q. That is one of the cross fences across the valley?

A. Yes, set right in this part (indicating).

Q. How about the boundary fences?

A. Boundary fences was all stone wall and wire and stone wall.

Q. Barbed wire?

A. No, straight wire; stone wall, wire and everything cattle go jump over them and push them over.

Q. Well, was there a gang working on that cross fence when you left? [235]

A. No, nobody at all. They had no enough men to do that work, because they have to attend to the water there and had no enough men.

Mr. Anthony: No further questions.

Redirect Examination

By Mr. Deuel:

Q. I want to get back at one point, Mr. Rodrigues. You say you continued working at the ranch until about March or April of 1942? A. Yes.

Q. During that period of time were the McCandless employees still working around and conducting ranch operations?

A. Yes, still driving cattle in Makua for the butcher.

Q. Still living around the same as they had before?

(Testimony of Manuel Rodrigues.)

A. The last drive I made in Makua got some butcher cattle, and I get hurt and that is the last thing.

Mr. Deuel: That is all. That is all, Mr. Rodrigues, unless the Court has some questions.

(Witness excused.)

Mr. Deuel: Does your Honor desire that I call another witness now? My next witness is a man who will be on for quite a little while.

The Court: Well, I don't think I can go any further with this case until Friday morning.

Mr. Deuel: Same time, your Honor, 10:00 o'clock [236] Friday, you mean.

The Court: Yes. If we start at 10:00 o'clock Friday, can we get through by noon?

Mr. Deuel: I have two witnesses.

Mr. Anthony: I don't know how many witnesses he has.

Mr. Deuel: I have two witnesses, your Honor.

Mr. Anthony: What are they going to testify about? One on value?

Mr. Deuel: One valuation witness, yes.

Mr. Anthony: What is the other one?

Mr. Deuel: The other one, general conditions and experience.

Mr. Anthony: Well, we had better start not later than 9:30, then, Friday morning.

Mr. Deuel: 9:30.

Mr. Anthony: Very well, your Honor.

(Thereupon, at 11:40 a.m., an adjournment was taken until 9:30 a.m., Friday, February 17, 1950.) [237]

* * *

February 17, 1950

The Clerk: Civil No. 886, A. Lester Marks and Bishop Trust Co., Ltd., Executer, administrator, C.T.A. and Trustees of the Estate of L. L. McCandless, deceased, vs. United States of America. For further trial.

Mr. Deuel: Call Mr. Child, please.

JOHN FRANCIS CHILD, JR.

called as a witness on behalf of the defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Just sit down, Mr. Child, please.

Direct Examination

By Mr. Deuel:

Q. Will you please state your full name, your residence and occupation.

A. John Francis Child, Jr., 2535 Pacific Heights Road, 37 years old, real estate analyst and appraiser.

Q. Mr. Child, were you born and raised in this community? A. Yes, I was.

Q. Have you lived here all your lifetime?

A. I lived here all my life with the exception of a short period away at school. I have been in business here subsequent to returning from school.

Q. And you are in the real estate appraisal

(Testimony of John Francis Child, Jr.)

business; [238] how many years have you been in that business?

A. I have been in that business since 1936.

Q. Did you have any experience in that field before that, or training?

A. At University of Pennsylvania I majored in real estate and finance, and I had a little bit of training prior to that time through business deals that my father was interested in.

Q. Will you tell the Court since your entry in the business here in 1936 what your experience has been in the field of real estate and appraisal matters.

A. From 1936 up to the beginning of the war I did considerable appraising of small homes and properties within the Honolulu area. Beginning with the war period I did condemnation appraising for Federal Government and was later on the staff as a staff appraiser for the 14th Naval District, Department of Public Works, and subsequent to that time I have been doing private appraising of various types, covering fishing rights, fisheries, ranch lands, farm lands, urban business properties, and almost all types of property, as an independent contractor and appraiser.

Q. Have you had occasion before this to appear in any court or courts as an expert on appraisal of real estate matters?

A. Yes, I have appeared in this Federal Court in the [239] other chamber several times in condemnation cases. Also in the Territorial courts.

Q. Mr. Child, are you familiar with the area in the northwest end of this island which for a number

(Testimony of John Francis Child, Jr.)

of years, quite a number of years, was operated by, and known as, the McCandless Ranch, that is, in the Makua Valley, so-called, and up on the Kuaokala area, and in that regard I will show you an exhibit which is Joint Exhibit A in this case? The areas of which I speak are outlined in blue in this area. One is designated in blue writing as Lease No. 1740 and the other one, Lease No. 1741. Are you familiar with those areas?

A. I have been familiar with those areas generally over a period of years, more particularly Makua area, and recently have gone over both areas and am familiar with them.

Q. In regard to those areas, Mr. Child, have you been employed by the Government to make an appraisal with regard to leasehold values?

A. Yes, I have.

Q. And did you make such an appraisal?

A. Yes, I have completed a study and appraisal of the leasehold, of the leasehold values of certain lands and improvements, including these leases.

Q. In making such appraisal did you relate your valuations to about the time of the outbreak of the war and very shortly subsequent thereto?

A. Yes, particularly around December 7, 1941, and just subsequently thereto.

Q. Will you tell the court what you did in regard to making this appraisal?

A. I assembled maps and the files of the Government in connection with the case in question and made a study of various leases in the area of cattle and of cattle production in that area, particularly of the

(Testimony of John Francis Child, Jr.)

Waianae Plantation. I visited the lands around Makua as completely as I could without going into restricted areas on foot and then I went over the whole Makua and the 1741 lease area in a helicopter with a view to covering the whole area as thoroughly as I could. I studied some of the records on file also for additional information, conferred with people, slaughter houses purchasing meat, and talked to people at the University with a view to obtaining as much information as possible.

Q. In making this appraisal did you consider this land on the basis of its being Territorial leased land for pasture purposes? A. Yes, I did.

Q. And as a result of your appraisal did you arrive at a fair market value as of the period stated, that is, fair market value for the leasehold? [241]

Mr. Anthony: I object to that. That is irrelevant. This is not a condemnation. This tort took place not on December 7, but during the entire period. They weren't condemning it as of a given date.

Mr. Deuel: If the Court please, it is my understanding they are contending for use and occupancy in the sense of an entry and the taking. If there were a tort, which the Government does not admit, in this regard, then the valuation constituted the taking at the time of entry, which they contend was at that period. Therefore the valuation should relate to that period.

The Court: Well, Mr. Anthony, you put in testi-

(Testimony of John Francis Child, Jr.)

mony as to the value of the leasehold, the remaining term.

Mr. Anthony: During the term, yes, that is correct, but this is a little bit different. Maybe I can take it up in argument. He is treating it as a condemnation proceeding.

The Court: The question doesn't convey much meaning to me. Of course, the answer might explain the question, I don't know, but as I get it, it is value of the land for leasehold purposes as of December 1941 and shortly after that; it doesn't seem to mean much to me. Can't you reframe the question in some way?

Mr. Deuel: I intended to ask the witness, your Honor, if he had formulated an opinion of fair value, that is, rental value, of this area, not the fee value, but the [242] leasehold value, or the rental value, based upon the time that is contended here that the entry was made by the Government, namely, about the outbreak of the war.

The Court: Well, leasehold value for what term?

Mr. Deuel: Mr. Marks testified, as you recall, that he placed a month-by-month rental on it for \$1125 for the whole area. I am getting at the same thing here, your Honor.

The Court: You didn't say that to the witness, that you wanted a month-by-month value.

Q. (By Mr. Deuel): Did you arrive, Mr. Child, at an opinion of fair market value for the remaining terms of these leases, as stated in the leases, which

(Testimony of John Francis Child, Jr.)
would expire on December 29, 1946, of a valuation month by month?

A. Since I was unable to have an exact term, or an exact date for the term, I broke it down on a monthly increment basis, with the general viewpoint of market value as of the period around the time the war broke out and subsequently, and I have formulated an opinion of the monthly amount during that period which would result in an over-all leasehold value.

The Court: Objection overruled.

Q. (By Mr. Deuel): Did you make that valuation for each lease separately, Mr. Child?

A. In my valuation I broke it down into the range land for each lease separately and for improvements on—that [243] is, building improvements on Lease 1740 and the range improvements on Lease 1741, separately.

Q. Will you tell us what your valuations were as to each lease, that is, by the month.

A. Breaking it down——

Q. That is, rental value.

A. The range and range improvement value per month represented in the premium of the leasehold would be, for Lease 1740——

The Court: What do you mean——

Mr. Anthony: I object to “premium.”

The Court: (Continuing) ——“premium of the leasehold”?

Mr. Deuel: I believe the witness can explain that, your Honor, what we are getting at in this

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method. It will result in the same figure, but he is breaking it down, what he considered a premium over and above the rent reserve. He will add that to the rent reserve and arrive at the figure. He arrives at a total valuation just the same.

Mr. Anthony: Rent reserve has nothing to do with it. If he is an expert, he can testify what the fair rental value is. It is for the Court to do any arithmetic, subtracting any rent reserve. It is not up to him.

Mr. Deuel: I will reframe my question.

The Court: All right. You say you considered these two leaseholds as separate entities, but in making your estimate of value—and I suppose you base it upon a stock raising ranch value; is that so?

The Witness: That's correct.

The Court: Well, now, what I want to know in that connection is whether you treated each one as a separate, independent stock ranch or whether you treated the two of them together and connected as a larger ranch, a ranch that would encompass both of them, but giving each leasehold a value by visualizing the whole thing as one operating concern. Do you understand?

The Witness: Yes, I did the latter, your Honor.

Mr. Deuel: The reason, your Honor, I have asked the witness to break these down separately is by virtue of the facts in the case. Your Honor will recall that Mr. Marks testified that he received from the Army in 1942 reimbursement for six months' rental on Lease 1741. It will be our contention that,

(Testimony of John Francis Child, Jr.)

having been reimbursed for that, that that period should be out, and we have to break these down separately. It will also be our contention that there was a joint occupancy of the premises for the first few months there, and it will be up to your Honor to determine.

The Court: All right.

Mr. Deuel: Therefore, it will be more helpful, I believe, to get these broken down, although he considered [245] the whole thing as an operating unit, to have it broken down as to each lease.

The Court: Go ahead.

Q. (By Mr. Deuel): Will you, Mr. Child, without breaking down the premium, so called, and the reserve rental, state what you determined to be the fair value by the month of Lease 1740.

A. \$182.50, including everything, per month.

Q. Is that the correct figure?

A. I am sorry. \$299.54 per month.

Q. And did that include the McCandless houses?

The Court: That is the premium value?

The Witness: No, that is the entire monthly value.

Mr. Deuel: Mr. Anthony raised the objection regarding the breaking down of this as to premium and reserve rental and adding them.

The Court: I heard him.

Mr. Deuel: We are avoiding that, your Honor, and giving the over-all value.

The Court: All right.

Mr. Deuel: At this point, your Honor—I had meant to do it earlier—we have pictures of the Mc-

(Testimony of John Francis Child, Jr.)

Candless house that was spoken of on the beach area there and the guest cottage, and I believe by agreement with Mr. Anthony, he agrees that they may go in. [246]

Mr. Anthony: Let me see them. (Handed to Counsel.) No objection, your Honor.

The Court: Have you any pictures of the new house that was built for the McCandless Estate?

Mr. Deuel: No, I don't believe so, your Honor. I am not certain whether he answered my last question.

Q. (By Mr. Deuel): Mr. Child, did your figure of \$299.54 on Lease 1740 include these improvements that were shown in these pictures just introduced in evidence, the McCandless house and guest cottage? A. Yes.

The Clerk: Do these exhibits come in as one or three?

Mr. Deuel: It makes no difference.

The Court: Put them in as one.

The Clerk: United States Exhibit No. 5-A, B and C.

The Court: Mark them as they are handed to you.

(Thereupon, the documents above-referred to were received in evidence as United States Exhibit No. 5-A, 5-B and 5-C.)

Mr. Anthony: Was there an answer?

(Answer read.)

Mr. Anthony: Is that your answer?

(Testimony of John Francis Child, Jr.)

The Witness: Yes.

Q. (By Mr. Deuel): With regard to Lease 1741, Mr. [247] Child, will you state what your monthly total value on that is for rental purposes.

A. \$136.33 per month.

Q. And on the two of them, which you say you considered for all purposes as an operating unit, the total monthly rental would be what?

A. \$435.87.

Q. In arriving at these figures, Mr. Child, what was the basis of your computation?

A. In connection with the range lands I made an investigation of various Government and other leases in the Waianae District, the cattle production in that area, records that I could get, primarily those of the Waianae Plantation for the Makaha Valley, which is adjacent to Makua. I considered that ranchers—considered that rentals are approximately the same for land as an increment for feeding cattle, that is, what it costs to feed cattle is in direct proportion to the amount paid in rent and carrying capacity of the range. The price which was paid by slaughter houses in Hawaii for beef, live weight beef delivered to slaughter houses—I studied that and found that in 1925, at the inception of the lease, that average prices paid for steers were \$17.57 a hundred weight. These figures are from the records of the Hawaiian Meat Company. I studied the records through a number of years and compared them with lease rentals that were [248] executed in those years, and in 1941—I will mention

(Testimony of John Francis Child, Jr.)

that for cows in 1925 the price paid was \$16.59 per hundred weight.

The Court: Sixteen what?

The Witness: Fifty-nine.

A. (Continuing): In 1941 for steers it was \$18.74 and for cows, \$16.63, there being a very small difference between 1925 and 1941. In 1942, which was immediately after this period, the price for steers was \$21.98 and for cows, \$18.76. The value of the range, providing it was very much the same in '25, or assuming that it was very much the same in 1925 as it was in 1941, would have been very much the same. However, from records and other information I was able to obtain, the range was improved during that period.

Allowance being made for these improvements, and again in connection with the carrying capacity of Waianae, which had 5500 acres in Makaha Valley and carrying about 800 head in that area of black Angus, Aberdeen Angus blooded cattle, and of the 5500 acres about 2700, between 27 and 28 hundred, were good haole koa and kiawe and grassland areas that were considered good pasture, and the rest was marginal and pali pasturage—making comparisons here, I classified the lands within these two leases in general, going over them with contour maps and by observation, I believe that the Makua Valley area is similar to that of Makaha. The upper areas of 1741 are not as accessible as the Makaha area, and I took [249] some pictures up there. The grasslands somewhat in some places subject to consider-

(Testimony of John Francis Child, Jr.)

ably more wind, with incised gulches with haole koa in them and considerably different type of land from Makaha.

I studied Mokuleia Ranch lease adjacent on the Kaena side, windward side of this area, with a few others, being perhaps more comparable. However, I think the lands on top are of better quality. Considering the lands under lease in 1740, that they had been given attention and that haole koa had been increased and some grass planted, I estimated a premium over the contract rent which had been agreed upon in 1925; also, as I stated, in consideration with the beef price being approximately the same or maybe slightly more. Feeling that the average——

Mr. Anthony: Just a minute. Is this in answer to any question, your Honor, or what are we doing there? I don't think he has been asked any question.

Mr. Deuel: If the reporter will read my question——

The Court: I think he asked a question. I don't recall what it was.

Mr. Anthony: It has been so long ago, I would rather have it proceed by question and answer rather than have Mr. Child talk to us.

The Court: I think he was asked to explain what he took into consideration. [250]

Mr. Anthony: Very well.

Mr. Deuel: Go ahead, Mr. Child.

A. (Continuing): An average for the area within 1740, \$1 per acre over all, with some of the

(Testimony of John Francis Child, Jr.)

better areas at \$2.50, \$1.75, and range down to pali land at about 12½ cents, marginal pasturage.

In 1741, which is not considered as accessible classified lands, form \$2.50 there again down to 12½, but with an average of 65 cents per acre over all. The figures on the——

The Court: Did you give an average on Lease 1740?

The Witness: Yes, \$1.

The Court: \$1. And that, you say, was the premium, or what?

The Witness: No, that is the rental that I allocated. The contract rental was 61½ cents over all. Premium for the whole area for 1740 is \$72.50—I am sorry, \$870.50 per annum on that basis.

The Court: For which lease?

The Witness: 1740.

The Court: \$870.50.

The Witness: For Lease 1741, premium was \$346. In Lease 1740 I allowed—I figured the monthly rental at \$72.50 and allowed for range improvements of fences and other improvements, excluding the houses and dwellings, of \$10 a month, making a premium of \$82.50. The two houses, I believe, [251] would have brought \$100 a month; that is, the large dwelling at sixty-five and the guest cottage at thirty-five, making a total of \$182.50 per month premium over the contract rent.

The Court: Premium of what?

The Witness: \$182.50.

(Testimony of John Francis Child, Jr.)

The Court: That, with the rental, makes you \$299.56, does it?

The Witness: That's correct, fifty-four. On Lease 1741 monthly premium was \$28.83. I have no knowledge of special range improvements there and made no allowance; and with the contract rent that would be \$136.33.

Mr. Deuel: You may cross-examine.

Cross-Examination

By Mr. Anthony:

Q. What is your over-all figure rental per annum of these two leases with all the improvements, Mr. Child? There are approximately 4700 acres; right?

A. That's correct. That would be, if my figures are correct, \$5220.44 per annum.

The Court: Fifty-two hundred what?

The Witness: Twenty dollars and forty-four cents.

Q. (By Mr. Anthony): Do you know of any ranch property of this area on the island of Oahu that would rent for anything like that?

A. I studied leases in that area and found——

Q. Will you answer the question.

A. Well, I——

Q. Can you answer the question?

A. I think that this property would lease for that amount, but I know of no others that have been leased at that.

Q. What is your answer? Do you know of any? Your answer is "no"?

A. That's right.

(Testimony of John Francis Child, Jr.)

The Court: You mean at the present time?

Mr. Anthony: Or within the last five years.

The Witness: Well, within the last five years I know of properties that would lease more but at that time I knew of none that would have leased for more.

Q. (By Mr. Anthony): What is the fair market value, in your opinion, of pasture land on the island of Oahu during the term of this lease?

A. Well, that is a difficult thing for me to say without knowing what area and the quality and other things about it.

Q. Well, do you know of any——

A. But the average rental range for all Territorial leases on this island was around 78 cents, and if you capitalize that amount, that would give a pretty good idea, if we say——

Q. Let's confine ourselves to leases that were entered into subsequent to 1942. [253]

Mr. Deuel: If the Court please, the Government contends that if there were wrong done here of wrongful entry of taking over this property that it was done at the early stages of the war and that constituted—which we do not admit, but it would have constituted the taking at that time, and that fixes the valuation dates for this purpose.

The Court: Well, yes, but these leases had some five years or thereabouts to run.

Mr. Deuel: That is correct, your Honor, but if there was a taking, then it was a taking over of a lease as of that time.

(Testimony of John Francis Child, Jr.)

The Court: Yes. How are you going to determine what the value of these unexpired terms was?

Mr. Deuel: Just by determining what the value was at that time, what the purchaser in the market and the seller would have negotiated for.

Mr. Anthony: I think I can ask Counsel a question that will point this up. Is the United States willing to stipulate that we receive interest on the damages that have been reflected upon the plaintiff in this case?

Mr. Deuel: Not willing to; the statute would preclude me from it.

Mr. Anthony: Precisely. If this were a condemnation case, they would have to make a deposit and then when the case was tried if there was a deficiency, we would get interest [254] on the taking. This is not a condemnation case. This is a case in which we are trying to get paid for the use and occupancy during the term of the lease, the value during that period.

Mr. Deuel: If the lease were taken over and occupancy, as contended, were to sustain in the early stages of the war, and that is the taking over for the whole period, that fixes the valuation time. I submit that values that might have accrued at later times, whether up or down or what, are not proper for comparison.

The Court: Overruled.

Mr. Anthony: Will you answer the question?

The Witness: I am sorry. I thought I had. May I have it read.

(Testimony of John Francis Child, Jr.)

Q. (By Mr. Anthony): Do you know the value of pasture lands that were leased subsequent to 1942?

The Court: Value of land, what do you mean there?

Mr. Anthony: Rental value.

A. Well, I can say this, that it increased year by year subsequent.

Q. (By Mr. Anthony): Isn't it a fact that some of those lands in the Waianae District were leased shortly after the outbreak of war, pasture lands?

A. Well, I know of several around 1944 and 1945, as I recall. [255]

The Court: The Court finds it needful to take a brief recess.

(Recess had.)

Q. (By Mr. Anthony): Mr. Child, are you familiar with the Government leases which were sold at public auction in 1944?

A. Yes, generally familiar with them.

Mr. Deuel: May the record show a continuing objection to this line of questioning.

The Court: Well, I don't care for that kind of an objection. I would rather have it specific as to a matter of this kind.

Mr. Deuel: It is all on the same basis.

The Court: The question now is, Is he familiar, and he says "yes."

Q. (By Mr. Anthony): They were of similar lands, pasture lands, sold at public auction?

A. That's correct.

(Testimony of John Francis Child, Jr.)

Q. Are you familiar with the Government lease of Territorial pasture land in 1944 of 1678 acres; are you familiar with that transaction?

A. What was the date again?

Q. In 1944, Territorial lease.

A. Yes, I believe there were two or three leases auctioned at that time. I am not sure which one.

Q. This was sold at an average price of \$4.10 per acre.

A. I don't recall the exact amount, but it was a considerable amount, as I recall.

Q. Don't you have any record of that?

The Court: Where was it? What island?

Mr. Anthony: This island, right next door to this land.

The Witness: Is that the Nanakuli lease that you are referring to? I don't have—it is 1755 acres. I am trying to identify it.

Q. (By Mr. Anthony): How many acres?

A. 1755.

Q. What date was that lease sold?

A. That was January 20, 1945.

Q. 1945? A. Yes.

Q. And what was the area?

A. 1755 acres.

Q. And what was the price?

A. \$6700, or approximately \$3.85, I believe, an acre.

Q. Were there any leases sold—that was at public auction? A. Yes. [257]

Q. Any leases sold in 1944?

Mr. Deuel: Your Honor, I would like to renew

(Testimony of John Francis Child, Jr.)

my objection to these questions. What I am getting at is on the same basis as my original objection to bringing out prices of leases sold later than the beginning days of the war, which, as I stated before, are contended by the Government to be the valuation date that should be adopted here, and it is to the questions regarding valuation of leases at later dates that I am objecting to.

The Court: Yes, I understand that there isn't any direct materiality as to that except as to the trend showing the increase in values, whether that has been equally progressive all the time or not. If you want the Court to take any notice of this as having any value at all, you should specify the length of the leases, the term that they run, because that is of vital importance.

Q. (By Mr. Anthony): What is the term of that lease that you have just testified to?

A. From January 20, 1945, to January 20, 1966.

The Court: Twenty-one years.

The Witness: The area is Nanakuli Forest Reserve.

Q. (By Mr. Anthony): The what?

A. The Nanikuli Forest Reserve.

Q. And that was approximately \$3.85 per acre?

A. Yes. [258]

The Court: What are the water facilities on the place?

Q. (By Mr. Anthony): Do you know anything about that?

A. There was water down at the lower end of

(Testimony of John Francis Child, Jr.)

the lease and the incumbent tenant had developed some water facilities, as the Hawaiian Meat Company at the lower end of the pasture. When I saw it, the water was piped in there from the Nanakuli system as a supplementary water supply. The upper areas were carried mostly on rainfall.

The Court: What was the rainfall of the upper area? All of these things are very important to value. Have there been any improvements made? Have there been any grasses planted or only the native grass? Are there sections of it where algaroba was developed or haole koa or any other food plants? All these things are of very vital importance as to the value of the land for ranch purposes. Without them it is practically meaningless to the Court.

Q. (By Mr. Anthony): Do you know these lands that we are talking about at Nanakuli?

A. Yes.

Q. This Government lease. Was there any improvement made on those lands?

A. There was some small improvement made by the Hawaiian Meat Company at the lower end, putting water on it and watering troughs and corral, and so on, and the upper area [259] had been fenced.

Q. How did they compare with the lands in the McCandless Estate that are involved in this case?

A. Well, they are roughly similar to some of the Makua area, having haole koa and kiawe and cactus.

(Testimony of John Francis Child, Jr.)

Q. The feed was similar, the range was similar?

A. Similar to about half of the Makua area.

Q. Well, which is better, or don't you know?

A. Well, by "similar," I mean that the quality would probably be quite close to about half of the area of Makua.

Q. Now, you didn't take the Nanakuli lease at \$3.85 into consideration in fixing your over-all value of \$1, did you?

A. No, I didn't because it occurred at a considerably later date under different conditions and also because of the bidding that took place. In analyzing it, I found that the incumbent tenants in the meat business had analyzed it at a considerably lower rate than had been paid for it, that the successful bidder was a man in the quarry business near by who wanted the area.

Q. Are you familiar with the Kawailoa lease?

A. No.

Q. On this island?

A. I am not familiar with it.

Q. Government lease? [260]

A. Specifically, out in this area.

Q. You determined a question of law that no rental values, no leases subsequent to 1942, had any relevance to the valuation that you should put on the McCandless lease in this case?

A. No, I didn't. That was on advice of Counsel.

Q. I mean, you took the instructions of Mr.—

A. That's correct.

(Testimony of John Francis Child, Jr.)

Q. I see. And, obviously, if that turned out to be in error, namely, that you should determine the value as of the particular year, your figure would be very materially higher, would it not be?

A. I believe that progressively——

The Court: What year?

Mr. Anthony: Just a minute. The year in which the occupation of the land in question occurred. In other words, this term ran to 1946.

Q. (By Mr. Anthony): If you valued it in the year 1946, for instance, you would reach a different figure than you have on your valuation?

A. That is correct.

The Court: Valued it how, for 1944, 1945, or 1946? Do you mean to infer it should be valued by what other leases were bid for?

Mr. Anthony: What I am endeavoring to explain to [261] the witness, your Honor, is this, that our contention is that we are entitled to receive in damages the fair value as of the year in which the land was occupied.

The Court: Yes.

Mr. Anthony: Now, Mr. Deuel's contention is you look solely at the time of entry and you figure out——

The Court: I know he made that contention, but the Court isn't going to follow that contention because, as I said in the beginning, we are not trying a condemnation case. We can't turn this into a condemnation case. Use and occupancy seems to stand in my mind. Now, how are you going to

(Testimony of John Francis Child, Jr.)

determine the value of the use and occupancy by going thus into what leases were bid for in 1945, 1946, or any subsequent time. They have no relation. I can't see any relation.

Mr. Anthony: It will give you rental value of the property.

The Court: No, that doesn't give the rental value of the property unless the lease was canceled and was released on a 21-year basis and the lessee would have time to make improvements to make it more valuable for the purpose that he was leasing it for. If he is renting it on a one- two- or three-year basis, that is the length the lease will run until it is expired, what can he do about it? He can't make any improvements. He can't help himself, and he has to take it as it is now. What is the earning value of the land during this time that the lease would continue to run? Those [262] are the only factors that I can entertain, as I see it.

Mr. Anthony: Well, at this time, then, your Honor, I move to strike the testimony of Mr. Child upon the ground that he has put his entire valuation on an erroneous basis, namely, that it relates to the period at the beginning of 1942 or shortly after 1941 and that is contrary to the rule of law that the Court has just stated.

The Court: I can't see it. You might question him at any length you wish——

Mr. Anthony: Very well.

The Court (Continuing): ——as to his basis, but, as I got it, he put it on an earning capacity

(Testimony of John Francis Child, Jr.)

basis. I assumed, or I gathered that that was the basis he was working on, that here was a lease that paid so much rental, now its earning capacity to the lessee was so much per month per year for the remainder of the year, and he based that, as I gathered it from his figures, upon what the price of beef cattle, the two different kinds at least, was at different times; and it seems to me in general to be a fair approach. You may go into that.

Mr. Anthony: Yes, I will, your Honor.

Q. (By Mr. Anthony): Mr. Child, you have never been in the ranching business, have you?

A. No, I never have been a rancher.

Q. Have you ever had anything to do with a ranch? [263]

A. Yes, I have been interested in—I was interested once in purchasing a share in one. I had a ranch over on Maui for sale and finally sold it to Mr. Vandenberg, made appraisal of it and studied it pretty carefully.

Q. That is Hanahuli subdivision?

A. That's correct. I have had occasion to appraise other——

Q. That is the only experience you have had with a ranch?

A. Well, I have had loan appraisals to make on certain dairy properties and some ranch lands at Koko Head, and I am affiliated with a company that finances importation of cattle and also——

Q. What is that company?

(Testimony of John Francis Child, Jr.)

A. The Honolulu Finance and Thrift Company.

Q. They import cattle, you say?

A. We financed operators who had over a period of years.

Q. Oh. A. We no longer do that, though.

Q. Well, now——

A. I might add one thing to that, if I may. In connection with the study of the ultimate use of the lands at Waianae I have worked with a ranch analyst who had a complete survey.

Q. What is a ranch analyst? [264]

A. A ranch analyst is a man who is familiar with operations and loans and advises insurance companies and others on the value and difficulties in bringing ranches up to better management operations.

Q. Who is this person?

A. A man by the name of C. H. Colvin.

Q. What is his name? A. Colvin.

Q. Where is he from?

A. From Texas, and he was employed by American Factors to make an analysis of Waianae.

Q. We don't have any such thing in this Territory as a ranch analyst; is that it?

A. Well, a ranch analyst maybe is not a well-known term, but it is my description of him.

Q. Have you finished with your explanation?

A. Yes.

Q. I want to ask you some questions. How did you arrive at your figure of first the monthly and

(Testimony of John Francis Child, Jr.)

then the overall value of this property, Mr. Child? What was the basis of it?

A. The basis of my appraisal is, first of all, what, in dollars, the market is for beef, live beef, at a particular period to determine what the outlook was. You also have to take into consideration the cost of feed, and the cost of land [265] is part of that cost of feed.

Q. Well, now, you took the price of beef in 1925; is that right, and compared it with the price in 1941? A. Yes, among other things.

Q. Well, they were the two principal factors—that was the principal factor, was it not?

A. That was one factor. Costs are another that are variable; when you consider what you can afford to pay for land, you have to figure what your other overhead costs are, as well as your market price of beef.

Q. Did you inquire into the price in 1942 and 1943 and 1944, in other words, during the term of this lease, the end of the term of this lease?

A. I did up to 1942, and I did, for trend purposes, investigate later prices and——

Q. Why did you stop at 1942?

A. I think I have stated that I followed the assumption on the advice of Counsel that the property, or the leasehold, is valued primarily from the viewpoint of a person in late 1941 or 1942, at the time occupancy was taken.

Q. If that advice is wrong, your expert opinion is wrong? A. That is correct.

(Testimony of John Francis Child, Jr.)

Q. Do you know whether or not——

Mr. Anthony: Withdraw that. [266]

Q. (By Mr. Anthony): Have you had any familiarity with the dairy business during this period? A. Some.

Q. Do you know that during this period, 1941 to 1946, the dairies on this island needed land to put their cows out to pasture on this island?

A. I know there was a very acute problem.

Q. And there was a very great demand for that, wasn't there? A. That's correct.

Q. In other words, instead of being able to ship to one of the other islands, they had to put their dairy cows out to pasture on this island?

A. That is correct. Transportation costs were one of the factors.

Q. And that would have a tendency to increase the value of pasture land of this character, would it not, during that period?

A. I believe that it would tend to wherever arrangements like that could be made for a temporary period.

Q. Well, the dairies were trying to make such arrangements, weren't they?

A. Yes, but they were interested primarily in short-term arrangements and were seeking lands.

Q. That is just what this was, wasn't it, a short-term arrangement? A. That is correct.

Q. So this was very desirable property from the standpoint of an adjunct to a dairy?

A. That condition that you state would make it

(Testimony of John Francis Child, Jr.)

so, but subsequent in time to the time in my immediate consideration, that is late 1941 and 1942.

Q. Do you know how much dairies were paying for land of this character, pasture land to put out their dry cows, during this period '41 to '46? Do you know?

A. I am just trying to recall. That is a long period of time. I have some knowledge of certain areas.

Q. Well, can you answer my question, Mr. Child? If you can't answer it, why just say so.

A. Well, I can't recall any exact amounts.

Q. Can you recall any inexact amounts?

A. I always like to refer to specific information when I can, and I don't recall. It is dependent on the area and the place.

Q. You described yourself as an analyst, a real estate analyst. Did you ever analyze that problem?

A. I analyzed that problem in connection with dairies on the windward side, which we were financing.

Q. Yes, and what did they pay?

A. I don't recall the amounts. [268]

Q. You didn't think that was relevant to your analysis?

A. I certainly did, but I don't have the figures in mind, and I didn't use it in connection with this particular appraisal valuation.

Q. Why?

A. Because of the location and the fact that there is not as much green grass area as would probably

(Testimony of John Francis Child, Jr.)

be required for dairy pastures for dry cattle. It is not as satisfactory as certain wetter areas, more controllable and better access.

Q. Do you think you are competent to pass on that question?

A. I have worked with people who have been. I am not, as I say, a dairyman or a rancher.

Q. Are there any dairies doing that very thing in the Waianae area now that you know of?

A. I believe the Aiea Dairy leased some property out in that area for such purpose, but on a 21-year lease basis where they could take whatever steps necessary to develop good pasturage for that kind of thing.

Q. What is the rental of that lease?

A. I believe the over-all rent is \$2 and something an acre. I haven't figured.

Q. That is 1678 acres for \$4100 per annum; is that the lease you are talking about?

A. That's right. I think that is about \$2.44 an acre [269] over all.

Q. What was the date of that?

A. That was January 20, 1945.

The Court: What does Hawaiian Meat Company pay the Campbell Estate on the windward side of Waianae slopes, do you know?

The Witness: The lands are not entirely graded within the lease, and as an over-all rental, including the lands on this side, it would be rather difficult to——

The Court: It isn't a per acre rental?

(Testimony of John Francis Child, Jr.)

The Witness: No, it is a gross amount with allowances for various deductions in case of condemnation and at certain rates per acre.

Q. (By Mr. Anthony): Are you sure of that, that it is not a per acre rate in the Hawaiian Meat Company lease?

A. It comes down to a per acre rate in that you can deduct or add acreage.

Q. In the event of condemnation?

A. That's right.

Q. Well, that is normal. You understand that, don't you? A. Yes.

The Court: Have you the figure there?

Mr. Anthony: I don't have it here, but I have a copy of that lease in my office and I am pretty sure the [270] witness is in error.

Q. (By Mr. Anthony): Do you know what the Pupukea Ranch property was leased for on this island?

A. I have that information, but I don't recall.

Q. Well, what is the information?

A. I don't have it here. I have it in my file, but, as I say, I don't recall it, and I didn't consider it.

Q. Was it \$3.29 per acre? Is that to the best of your recollection? A. I wouldn't know.

The Court: What lease?

Mr. Anthony: Kawailoa and Pupukea.

The Court: What?

Mr. Anthony: There are two leases. A lease at Kawailoa and Pupukea.

(Testimony of John Francis Child, Jr.)

The Court: Two?

Mr. Anthony: And I want to know if the witness knows about either one of them.

The Witness: Those are Hawaiian Meat Company leases.

The Court: Where are they located?

Mr. Anthony: On this island at Kawailoa, I believe it is. Waialua Agricultural Company is the owner in fee; whether or not Dillingham comes in there or not I am not certain. There was a lease.

The Court: That is against the Koolau Range?

Mr. Anthony: That is correct, near the Industrial School in that area.

Q. (By Mr. Anthony): Are you familiar with those leases?

A. Not specifically. I know of them, that is all.

Q. You didn't make any study of them for the purposes of this case? A. No, I didn't.

Mr. Anthony: No further questions.

Mr. Deuel: You may be excused, Mr. Child.

(Witness excused.)

Mr. Deuel: Call Sergeant Teague.

WILLIAM TEAGUE

called as a witness on behalf of the defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Just sit down, please.

(Testimony of William Teague.)

Direct Examination

By Mr. Deuel:

Q. Sergeant, will you please state your full name? A. William Teague.

Q. And you are, of course, in the Army of the United States?

A. Yes, I hold the rank of sergeant first class.

Q. And how long have you been in the Army, sir?

A. This is my eleventh year in the Army. [272]

Q. Prior to that what did you do?

A. I was engaged in ranching with my father in the United States, raising of cattle and pigs, and also goats.

Q. Where was that?

A. In Colorado and also in California, and in the central part of Missouri.

Q. How extensive was that experience?

A. Well, all of my life I have been engaged in it with my father.

Q. Cattle and general ranching activities?

A. Yes. At the present time my father has a ranch in northern California.

Q. Sergeant, where were you stationed at the time of the outbreak of the war, December 7?

A. I was at Schofield Barracks stables Sunday morning.

Q. Had you been there for some little time before that?

A. Yes, I first came to the Islands in '39. 1

(Testimony of William Teague.)

was stationed with the Hawaiian pack train at Schofield Barracks.

Q. Pack train?

A. Yes, the old Hawaiian pack train.

Q. Now, on and immediately following December 7, what was your assignment, Sergeant?

A. Immediately on December 7, why, we went in the position in the stable area. We were moved from the stable area on the other side of Waianae over near the reservoir, [273] over there with our animals. From there we were moved to what is known as Kaena Point area.

Q. Kaena Point area, you say?

A. That was designated as our protecting area of the island, at Kaena Point area, from Dillingham's across to the other side of the island, what is known over there as the Waianae pocket and Makua, in through there.

Q. I refer you, Sergeant, to the map here, which is Joint Exhibit A, and shown on the map outlined in blue are two areas on which have been written, on one, Lease No. 1740, and on the other, Lease No. 1741. I would like you to state whether or not the areas which you said you were assigned to shortly after December 7 included these areas shown on the map.

A. That was our area, yes, from one side of the ocean to the other.

Q. And how soon after December 7 did you go into that area?

(Testimony of William Teague.)

A. The fourteenth of December we went into position there.

Q. Fourteenth day of December, 1941?

A. 1941, yes, sir.

Q. And will you tell us what your duties consisted of—well, first of all——

Mr. Deuel: Strike that. [274]

Q. (By Mr. Deuel): How long did you remain in and about that area, Sergeant?

A. Permanently till in '43, along in the summer of '43 we was permanently on the positions there in that area.

Q. Will you tell us what, during that period of time from December 14, 1941, up through the spring and summer of 1943, your duties were in this area.

A. My duties were in that area over-all observation of the area. I was in charge of all patrols that was in that area, also in charge of the two OP's that was there, that was observation posts. 109 and 112 that was in that area. I had six machine gun positions and two mortar positions in that area.

Q. During that time did you stay pretty much in one location?

A. I was all over the whole location there. That also included day and night patrols.

Q. In other words, you were constantly patrolling this area? A. That's right.

Q. Including these areas shown on the map?

A. Because we had to send in reports every four hours from that area in there of our observations.

Q. Did you observe, when you first went into

(Testimony of William Teague.)

the areas, first of all, troops down along the beach areas? [275]

A. There were two squads along the beach area down there. There was approximately, in the two squads, they was manned, and they was approximately about 15 men down there was all there was. They were scattered along with water cooled machine guns.

Q. And did you observe what activities they carried on?

A. They were making emplacements down there and also stringing some barbed wire aprons down in there.

Q. And can you tell us just where all this activity took place? Was it close to the beach or did it go up in toward the mountains?

A. They were along the beach line there, on the beach line and across the railroad, right into the mouth of the Makua pocket, and also the Windmill pocket.

Q. You say "Windmill pocket"?

A. Yes.

Q. What do you refer to as the Windmill pocket?

A. That is in the other area up from Makua here, down in through this area here (indicating).

Q. That is the beach area?

A. That is the beach area. That is known as Windmill Pocket.

Q. But on the map it is right below the area which is printed "Keawaula," the beach area along here? [276]

(Testimony of William Teague.)

A. Yes, right in through there. There is a windmill that sits in that area, and on our observation and our reports it was reported as the Windmill Pocket.

Q. I note on the map there also is the word "Windmill" along there.

A. Yes, it was known on our reports as a Windmill Pocket and this was the Makua Pocket (indicating) up in there.

Q. You have spoken of some troops along the beach areas there. A. Yes.

Q. You mentioned about fifteen. A. Yes.

Q. Two squads of troops, fifteen men.

A. We had one squad, 21st Infantry, and also part of the 19th Infantry was supporting us. They was in this area (indicating).

Q. You are pointing to the Makua Pocket?

A. Yes, in through here (indicating).

Q. That is the beach area, though?

A. Yes. On one point of the pocket there was an observation post there and they was in here with their water cooled machine guns and also in through here, because that was proposed landing, for any of the troops to move back up into the hill area there.

Q. Can you tell us whether or not the troops which [277] were along the beach went back up into the Makua area in the early days of the war?

A. They did not go back up in there, no, because on my patrols I covered all of these areas.

Q. When you say "all of these areas," you are

(Testimony of William Teague.)

pointing both to the ranch areas outlined and forest reserve?

A. Yes, sir, their orders were to stay on the beaches and hold the beaches while we run our patrols back up in there, so they wouldn't conflict with us or anything. We moved back up in these areas (indicating).

The Court: What kind of patrols did you have?

The Witness: We had mounted patrols, mounted on horses, and at night we had our foot patrols, dismounted patrols.

The Court: How many troops?

The Witness: Including the two along——

The Court: I mean in your patrol.

The Witness: Altogether up there is wasn't exceeding 75 men. It also included a supply train that came from down near the Dillingham Ranch. They brought supplies up to us on mules, and also forage and grain they brought up in to us.

The Court: Did they bring it over paths?

The Witness: They brought it up over what is known as Kawaihapai Makua Trail. They made a junction at their [278] trail shelter, because I was—I had my horses up in a gulch just down from the trail shelter, and they brought all of our forage in to us and also rations for the men.

Q. (By Mr. Deuel): You recall, do you not, Sergeant, that sometime late in 1942 the Makua area developed into a training area and more troops were brought in?

A. Later on it did, but the early part there was

(Testimony of William Teague.)

none there, because we was thinly scattered on the point. There were not very many of us.

Q. And when you spoke of 75 men in these whole areas, that was for approximately how long a time? Was that up until the time the training operations started?

A. That was up until the time the training operations started down there and more troops came in from the station.

The Court: Did you have any central camp?

The Witness: Our central located point was what is known as the trail shelter on the Makua Kawaihapai Trail.

The Court: Somewhere along in here (indicating)?

Mr. Deuel: It is in the area designated Kuaokala Forest Reserve on the map.

The Witness: Somewhere in that general area. If I had a trail map, I could mark it off plain.

Q. (By Mr. Deuel): You have mentioned troops along the beach area. Can you tell us what troops there were, if any, up on the Kuaokala area? [279]

A. Well, up in there is where the Hawaiian pack train, that was our holding areas up in there.

Q. What all was up there? Were there installations of some kind?

A. We had two observation posts up there; one was 109, so we could overlook the Windmill Pocket and also into the Makua area. And our other O.P. was generally, I would say, in this locality in here (indicating) so we could observe from the far side

(Testimony of William Teague.)

over in there. Also, our missions were to watch for submarines in through that area.

Q. Up in that area, speaking again of Kuaokala, were there any vehicles running around up there?

A. There were no vehicles, because you cannot get in that area with vehicles. Later on the Army engineers built a road from Dillingham's to the trail shelter. You could get over that with small 3-ton vehicles.

The Court: What point do you call Dillingham's? The Mokuleia?

The Witness: Mokuleia, yes, sir. That is where the old trail used to start from, right back of his barns there, and come up into that area, and also the one that came from Kawaihapai.

Q. (By Mr. Deuel): That trail, I gather from what you said, did not run into this Kuaokala area designated Lease No. 1741? [280]

A. No, it came out through here (indicating) and then across it went, and the other one went down into the Makua Pocket.

Q. I mean the road on which vehicles could travel?

A. No, the road did not. It went as far as what is known as the trail shelter. They said that was maintained by the foresters, this trail shelter they had up there.

Q. Sergeant, in your observations around there, do you recall up in the Kuaokala area that the Army did something with water supply up there?

A. Well, the way on the water supply, it was

(Testimony of William Teague.)

my recommendation on my horses up in there, that they had a spring in a gulch there——

Q. Is that the one, Manini Gulch there?

A. Yes. And with working on this spring, it was a very small seeping that came out of there, so the Army engineers came in there and dug in back to where this spring was. There was always a flow of water coming out of the spring while they was digging, and they constructed a pipe line in from the spring proper, made a small catch basin there, and then on the outside they constructed on the outside there a large concrete tank, or what is known as a cistern or catch basin. The water was piped into that and we utilized from the tank for our water supply for cooking and also for the animals. We had portable canvas water troughs that were kept [281] filled at all times, on the outside of the tank, the large catch tank proper.

Q. Can you tell us, Sergeant, did you observe cattle around in that area? A. Yes.

Q. Can you tell us from your observation what was done with regard to those cattle in so far as concerned that water supply there?

A. The cattle was never kept from water at all at any time. They always had access to the water, and at times they have often watered down there when we would be watering our horses down there and also our mules; and another thing, in the area wherever we could locate a small seeping spring, we would dig out and make a little wooden dam there for catch basins for water.

(Testimony of William Teague.)

Q. And did the cattle have as free access as your——

A. They had access at all times to the water. They was never kept from it.

Q. Now, with regard to water in the Makua area, do you know anything about that and whether or not cattle were kept from any water in there?

A. They were never kept from there; along down from what we knew as the Makua trail there were small seeping springs in there, and I also instructed patrols down in there to make catch basins in through that for watering purposes. [282] Cattle watered at those places, and if we was on mounted patrols or anything, why in these small seep places we could also water our animals.

Q. Speaking further of the cattle in there, of both areas, now, did you ever observe the troops making any particular disturbance of those cattle?

A. They made no disturbance of cattle at all in there.

Q. When you say "in there," are you speaking of both the Kuaokala, or Lease 1741, and Lease 1740?

A. In both places, yes, because that comes under an order of protecting properties. That is one duty we have as soldiers in the United States Army.

Q. Did you also have specific orders in regard to these cattle?

A. We had orders from our commanding officer; Major Buchanan was commanding officer of the Hawaiian pack train then, and we were not to bother

(Testimony of William Teague.)

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(Testimony of William Teague.)

any cattle or any pigs in our area. Another thing, on saying of bothering or killing, there is strict orders in the Army that no meat or anything like that will be used unless it has been properly inspected by a licensed Government veterinarian officer.

Q. In other words, if any soldier were to do something of that kind, it would be wholly outside of orders and instructions; is that right?

A. That's right, because a person never does know what [283] the meat, whether it is diseased or anything like that. You never use your meats unless they have been passed and approved by your veterinary officers.

Q. You mentioned something about some pigs in here. Did you see some pigs in the area?

A. There was pigs in the area.

Q. Did you see them from time to time?

A. That is right, and there was also a few wild goats in there.

Q. And what were the pigs like that you saw around there?

A. From my observation of them, that was a very poor grade of pigs. I would class them as a wild variety of pigs.

Q. That is, they were roaming all over?

A. Down through the Southern country in the States they would be classed as razor back hogs.

The Court: Well, were they pigs that were frightened of any person approaching near them on horseback?

(Testimony of William Teague.)

The Witness: On the cattle and pigs, no, sir, they never were in there, because we would never make any disturbance to stampede them or anything like that, and they just came all around where our positions was and everything like that. They was with us all the time.

The Court: They were looking for scraps?

The Witness: Well, the pigs, they enjoyed it, what [284] few scraps we had, sir.

Q. (By Mr. Deuel): Sergeant, you spoke of having been raised on a cattle and stock ranch, and from your experience in that regard are you able by observation of cattle to tell something about the quality of cattle? A. Yes.

Q. And you observed these cattle in this area?

A. Yes.

Q. What can you tell us regarding the things you know from your observation regarding those cattle?

A. From my observation of it, they was a poorer grade of cattle, and it seemed like there was no supervision of the care of them at all. There was bulls and calves and everything else just running together up in through there, and there was no supervision of it, it seemed like. There was too much chance of being cross-bred through there, and the bulls looked like they were very poor grade. Also in the unit that was up there there was quite a few that had been raised on ranches in the States.

Q. You are speaking now of the other troops with you?

(Testimony of William Teague.)

A. In the other troops. In the old days they used to pick, in the outfits and everything, they would pick men out that had experience on ranches, particularly on horses, and also cattle, that were put in all the animal units.

Q. From your observation of those animals up there, [285] Sergeant, are you in a position to state whether or not you observed any of them that were sick or tubercular?

A. Well, sir, I couldn't pass on that unless there were proper tests by a veterinarian. That is the only way you can tell. You can't just look at an animal and say he has got tuberculosis or anything else unless the veterinary takes the proper tests.

Q. I presume in your observations up there, Sergeant, that you saw either fences around or remains of fences in the areas; is that correct?

A. Yes.

Q. Do you recall at the upper or mountain end of the Makua Pocket area any kind of a fence between that upper end and along the forest reserve area, or, looking on the map here, it is the line more or less paralleling the ocean, which is farthest away from the ocean?

A. Well, on that, sir, you couldn't very well pass and say it was a fence, because it wasn't, sir. There might have been a fence there at one time, but there were posts and wires on the ground and places where the posts had rotted off, so as an animal might—I wouldn't class it as a fence, sir, because it had no holding qualities at all about it.

(Testimony of William Teague.)

Q. Did you observe that fence sufficiently so that from your experience you could tell whether or not it had just recently been broken down or whether it had been in [286] poor condition for some time?

A. From the looks of it, it had been quite some time since the fences had went down, from the conditions of the posts that had been rotted off, and everything like that, and the wires down, and from all indications and from my own observations of seeing animals going back and forth in through there, of the cattle moving in through there.

Q. In the early days when you first went up there, you saw cattle on both sides of the fence lines?

A. On both sides. It was our duties when we made our patrols, in reports on it and everything, we would report where we would see stock in different areas in there.

Q. It has been testified in the case, Sergeant, that someplace over in this Kuaokala area up on the plateau, Lease 1741, that there was a wing fence in there. Did you see anything of that kind?

A. There was one in there, but it was in a poor state of repair. Also down in the gulch it looked as what had been at one time a holding corral down there is what I would say, where animals had been brought in and held until they was moved out of an area.

Q. Now, from your experience, again, can you say whether or not those fences that we are just speaking of were in a bad state, just newly broken

(Testimony of William Teague.)

down, or whether they had been in a bad state or condition for some time? [287]

A. From my observations, sir, at some time they had been broken down.

Q. You mean both of the fences we are talking about were broken down prior to the war?

A. I would say they were, yes, sir.

Q. You were up there just a week after the war broke out? A. Yes, sir.

Q. Sergeant, from your experiences up there I have asked you a number of questions about these matters. Can you think of anything else that is pertinent along the lines of the questions I have asked you that we have not brought out?

A. I can't think of anything right at the present time.

Mr. Deuel: You may cross-examine.

Cross-Examination

By Mr. Anthony:

Q. How long did you stay up there, Sergeant? You said you went there a week after the war broke out; when did you leave?

A. I was there until the summer of '43 permanently, sir. I was right there.

Q. And you stated that you were in command up there; is that right? [288]

A. As a sergeant, yes, sir, not as an officer. We had a commissioned officer that was in command,

(Testimony of William Teague.)

Major Buchanan, of the Hawaiian Division Pack Train.

Q. Did he have any officers under him?

A. We had a Lieutenant Reed under him, was an executive officer.

Q. What?

A. Lieutenant Reed, a field artillery officer.

Q. And how many in this unit?

A. That was in the area.

Q. Yes, how many officers and men?

A. Including our officers and men it didn't exceed 75, including the two that was down on the beach, sir.

Q. And that unit was known as what?

A. The Hawaiian Division Pack Train.

The Court: Didn't have any cavalry?

The Witness: No, there was no cavalry, sir. We had three sections in the Hawaiian Division Pack Train. We had a horse section, a pack section, and also a wagon section. Our purpose in the horse section, we had our patrols. We also carried water cooled machine guns and light machine guns for protection of the train proper when we was working with the train. When I speak of the train was when we had the wagon section and pack section in the field.

Q. (By Mr. Deuel): Do you know where the McCandless [289] ranch house was?

A. Down in there, yes, sir.

Q. Was there a camp right opposite their house?

A. At the start they were on the beach there.

(Testimony of William Teague.)

They were living down there in pup tents. Later on there was a camp established in the pocket there.

Q. Were you in that camp that was established later on?

A. No, sir, I was not in the camp.

Q. Do you know how many officers and men were in that camp?

A. No, sir, I don't know how many men and officers were up in there later on.

Q. Was that part of this Hawaiian Division Pack Train?

A. No, sir, that was not. That was——

Q. Well, then, there were other troops there besides the Hawaiian Division?

A. At the start we were the only ones, sir.

Q. Well, can you tell us when the other troops came in?

A. The other troops came in there, as near as I remember, sometime in 1942, I would say the latter part of the fall, in there; as we got replacements from the States, why all units were built up.

Q. You don't know when they came in?

A. I don't know the exact date, no, sir.

Q. Sometime in the year 1942? [290]

A. Yes, sir, in the late part.

Q. And they roamed all over the whole place; is that right?

A. No, sir, they did not roam all over the place. Soldiers did not roam all over the place. They are supervised wherever they go.

Q. Can you give us some idea how many soldiers

(Testimony of William Teague.)

were down in that area in 1942 apart from your 75?

A. I don't know approximately how many men were in there at the present time. There were a small group. I would say that it would never exceed 40 men. That was from observations from the upper areas there, because we could look right down into that area from our observation posts. We had BAR positions up there on the ridges.

Q. You were looking from the top of the hill down at the troops in the valley?

A. Yes, sir, with glasses you can see the floor of the valley, with glasses, the same as you can look over this railing and see the floor down there, see all movements down in there.

Q. Now, you testified that you observed a fence which you believed had fallen into disrepair prior to the war?

A. I would say yes, sir.

Q. Was that fence on your patrol?

A. That was part of our area, yes, sir, down in through [291] there.

Q. Up on the ridge?

A. Where the fence was, sir, the lower part there.

Q. What area was that?

A. At the far end of the pocket from the seaward side.

Q. The patrol went all the way up that ridge, did it?

A. We covered all of that area in there, sir. That was part of our mission, to observe that whole area and make reports on it. When we first went

(Testimony of William Teague.)

in there, we knew not what was in that area. We were looking for radio stations primarily in there or enemy troops that had been landed in that area, because there is a rough area in through there and there is quite a possibility that enemy troops could have been landed and laying back in there. That was the purpose of our day patrols and also our night patrols in there.

Q. Did you ever see any cattle that were shot by troops?

A. No, sir, I have never seen any cattle that were shot in that area.

Q. Did you see any cattle that were shot at all, whether the shooting was done by troops or not?

A. I seen none killed in that area.

Q. You saw no dead cattle?

A. I seen none, no, sir.

Q. By the way, did you make reports of your observations? [292]

A. I made reports to the C.P. That was the command post.

Q. Where are those reports now?

A. Sir, I do not know where they are. I keep no record of reports.

Q. What did you do with them when you finished with them?

A. I sent all of my reports that went back to the C.P. by mounted messenger.

Q. To whom?

A. To who was in charge of the command post.

Q. You don't know where they are now?

(Testimony of William Teague.)

A. No, sir, I have no idea where they are. When you are on patrol, all you carry with you is a message book. You make out a message and report and send them back to command posts. You keep no record on you.

Q. Have you had any opportunity to refresh your recollection from your actual notes? You didn't find them?

A. I carry no notes.

Q. You made some messages?

A. They were sent back.

Q. What I am getting at, did you ever find those in preparation to come here and testify?

A. No, sir, I never have.

Q. Did you make any effort to look for [293] them?

A. No, sir, I wouldn't have the least idea where they could be at the present time.

Q. What were the names of the units that came to that area in 1942, apart from your unit?

A. They were the 21st and the 19th Infantry, sir.

Q. Twenty-first Infantry?

A. And the 19th, yes, sir.

Q. Did you notice any part of this area used for a bombing range?

A. Not at that time, there was none, sir.

Q. Was it used for any firing of any character?

A. There was supervised firing, yes, sir, because every day we would test our guns.

Q. Everything that is done in the Army is supervised, isn't it?

A. What I mean by supervised, sir, you just

(Testimony of William Teague.)

don't start firing just out into blank space or anything like that when you are testing a gun. You always have your safety precaution out before a gun is ever fired, sir, so you will not kill your own men if they are in the area.

Q. I am not saying there was indiscriminate shooting, Sergeant. Don't misunderstand me. Was there actual firing done?

A. There was firing, test firing of our guns, yes, sir.

Q. A great deal of it or very little? [294]

A. There was very little because we were conserving ammunition, sir.

Q. That is in the early part of 1942?

A. That's right, sir.

Q. But later on the 19th and 21st did get ammunition, did they not?

A. We had a little more liberal allowance of ammunition, but we didn't fire it, though, sir; we tried to conserve as much as we could because in those days every round was valuable, sir. We had very few of them and we was trying to protect an island here.

Q. What part of this land did the firing occur in?

A. We fired in the ocean, sir, and we fired into banks.

Q. What valley?

A. We fired in the Makua and we also fired on the ridges up there, sir. In the banks where we had our gun positions. Sometimes we would make

(Testimony of William Teague.)

a temporary placing of a gun so we could defend a trail or a certain portion, and we would test fire on it.

Q. Did that have any effect on the cattle?

A. No, sir, none that I could notice.

Q. Did they stay right there and watch it?

A. They didn't bother about it at all, sir. There was no wild stampedes of any kind or anything like you see in some of these Western movies and one thing and another, or [295] anything like that, sir.

Mr. Anthony: No further questions.

Redirect Examination

By Mr. Deuel:

Q. Just one further question, Sergeant, I intended to ask you. Did you at any time while you were there observe ranch personnel coming in; were they allowed access to round up some of these cattle?

A. There was parties that came up from the ranch down there. There were cowboys, and they had been passed before they came up there into our areas. The report was sent up to us of descriptions of men and how they would be mounted and how many there would be in the parties, and they had access to the cattle. They would come up there and talk with us as, you would say, one stock man to another, "Did you see any cows?" or anything like that. "Yes, I seen a little bunch over in the other gulch," or something like that, or where they was located. We tried always to work with them, and at times they would come up there and say they

(Testimony of William Teague.)

was going to take out some cattle, and they would take the cattle out.

Q. Did the troops or your group over there ever bother them?

A. They were never bothered, no, sir.

Q. They were allowed free access to come in and work the cattle? [296]

A. That's right, come in and work the cattle.

Q. And that happened on several occasions?

A. Yes, sir, there was quite a few occasions. They always came in. They had free access to the range lands up there and all of the area in there, and also to the stock. And we tried to help them as much as we could. As I say, we would tell them where we had seen bands of cattle.

Q. But they would have to have passes; otherwise they couldn't have access to the range?

A. They were passed to come up in there.

Q. On each occasion when they wanted to go for a herd of cattle?

A. We were always told that they were coming up in the area, yes, sir.

Q. On every occasion? A. Yes, sir.

Q. They didn't get one pass that was good for six months?

A. Well, sir, on the pass proposition I wouldn't say on that. We were passed by our officers to let them come into the areas and work their cattle.

Q. When these patrols were up there looking for the enemy that you have testified to, did they stick right to the trail? A. No, sir. [297]

(Testimony of William Teague.)

Q. They went right on through the whole area up there?

A. We went through the area. We were small patrols, sir.

Q. What happened when you would come to a fence? A. When we come to a fence?

Q. Yes. You would cut right through it, wouldn't you? A. No, sir, we cut no fences.

Q. How did you get through them?

A. There were no fences in the area where we were down in through there, sir.

Q. None at all?

A. There were broken fences, as I spoke about before, was all that was down in through that area, sir.

Mr. Deuel: No further questions.

Mr. Anthony: That is all.

Examination

By the Court:

Q. There is an assumption in some testimony that there are still duds lying around through Makua Valley there; do you know how that could be accounted for, whether it is true or not, or just a supposition?

A. Later on there was artillery firing in there, sir.

Q. From the sea? Artillery firing from the sea?

A. Land artillery, sir. And as far as the duds or anything, sir, I wouldn't have no idea on that. That would [298] probably come under——

(Testimony of William Teague.)

Q. How much later on?

A. That was the later part of the war, up into 1944 and 1945.

Q. What was the purpose of the firing into the valley? A. Training.

Q. Where were the guns located that were firing?

A. They would make temporary positions.

Q. What size guns?

A. They used 75's in there, and there was 105's used in there.

Q. And the purpose of that was merely for artillery practice? A. That's right, sir.

Q. If they practiced artillery, they would have a definite target to shoot at?

A. That's right, sir.

Q. And that would likely be against some block or wall?

A. That's right, sir. It would be supervised firing with all the safety precautions.

Q. Well, if there were any duds, they would be largely in the target areas?

A. That's right, and they would be marked and everybody would be notified that that was a dud area and it was dangerous [299] to proceed through there.

The Court: All right.

(Witness excused.)

The Court: What more have you?

Mr. Deuel: Your Honor, that is the last wit-

ness I have at the present. I would like to make a motion, however, and there was one man spoken of early in the case by Mr. Anthony, Mr. Sebastian Rainy, ranch foreman out there at this time for McCandless. They had stated they intended to call him. I would also like to have him here. In fact, the record will show I issued a subpoena for him, but it was reported he is in the hospital at Pahala, Hawaii, with a broken leg at the present time. He is the man that I think probably would have more knowledge to help the Court more in this matter than anyone else, and I would like to make a motion that the decision be held up and there be a continuance until we can get him over here to testify. He should, I think, in the near future have his leg in a cast and be able to come over.

Mr. Anthony: We have no objection to that. We would like to have him ourselves. We have a couple of other witnesses, short witnesses.

The Court: How short?

Mr. Anthony: Well, I would say about an hour.

The Court: Half past one, or two? [300]

Mr. Deuel: Half past one or two o'clock?

The Court: Two o'clock.

(Thereupon, at 11:45 a.m. a recess was taken until 2 p.m. of the same day.)

* * *

Afternoon Session, 2:00 P.M.

Mr. Anthony: Mr. Minami.

SUSUMU MINAMI

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Be seated.

Direct Examination

By Mr. Anthony:

Q. What is your name? A. Susumu——

The Court: This witness is put on in rebuttal?

Mr. Anthony: Yes.

A. (Continuing): Minami.

Q. (By Mr. Anthony): How old are you?

A. I am thirty-four.

Q. What business are you in?

A. I am in the hog business.

Q. How long have you been in that business?

A. About fifteen years.

Q. On the island of Oahu? A. Yes.

Q. Were you in that business during the war?

A. Yes.

Q. How many hogs do you buy or sell in the course of a year, approximately?

A. About two thousand head every time on hand.

Q. Every time what?

A. On hand, because we wholesale and retail.

Q. Two thousand a year?

(Testimony of Susumu Minami.)

A. Two thousand head on hand, we have on hand.

Q. And you are constantly buying and selling hogs? A. Yes.

Q. Is that right? A. That's right.

Q. Of all kinds?

A. All kinds. All kinds, sizes.

Q. Are you familiar with whether or not there was any OPA prices in existence in 1942 on hogs?

A. OPA came in in July 1, 1942.

Q. July, 1942? A. Yes.

Q. And what size hogs were regulated by OPA?

A. Above 175. [302]

Q. How about smaller than 175 pounds?

A. Smaller than 175 pounds there was no price set.

Q. Lower than that?

A. Higher than the OPA set price.

The Court: I don't get it. Do you mean there was not any special price set for hogs under that weight, that they just went along with the rest of them?

Mr. Anthony: There was no price fixed at that rate.

The Court: There was no special price fixed? They weren't given a higher price or lower one, but the same price was uniform throughout?

Mr. Anthony: No, they weren't regulated. I think that is his testimony.

The Court: I can't conceive that there was no price fixed on hogs if they fell just below 175

(Testimony of Susumu Minami.)

pounds, because many a 160-pound, 165-pound hog goes to market.

Mr. Anthony: That is what I understand the witness to say.

The Court: I don't get it. That is what I am trying to clear up.

Q. (By Mr. Anthony): Do you know what weight of hogs had an OPA price fixed?

A. About 175 pounds—above 175 pounds, because there was a shortage of live hogs. They set the weight of 175 pounds to be slaughtered, not less than 175 pounds. [303]

The Court: Couldn't be slaughtered?

The Witness: Yes.

The Court: Couldn't slaughter hogs under 175?

The Witness: Yes.

The Court: That threw all the luaus out of the window?

The Witness: Yes, that was stopped. Kalua pigs and Chinese roasting hogs were stopped altogether.

The Court: While there was no price fixed on hogs less than 175, they were forbidden to come into the market?

The Witness: Yes.

The Court: All right.

Q. (By Mr. Anthony): Now, can you tell us what the fair value at that time of a 50-pound hog would be out of a herd?

A. About 25 to 30 dollars.

(Testimony of Susumu Minami.)

Q. Twenty-five to thirty dollars? A. Yes.

Q. Each? A. Yes.

The Court: Well, what would a 175-pound hog be worth?

The Witness: One seventy-five would be about \$50.

The Court: What time are you talking about?

The Witness: '42, '42.

The Court: Right at the beginning of OPA?

The Witness: Yes.

The Court: Well, had the price of hogs run away in the meantime, the price of pork?

The Witness: No, the first part of 1942, the first six months of 1942 there was no OPA price. Well, the price was going higher and higher and less live hogs on this island. In June they were talking about OPA coming in and they set the price, and it came into effect July 1, 1942.

The Court: And what makes you put a higher value on a pig per pound of a pig weighing 50 pounds than you do on a pig or hog ready for the market?

The Witness: Well, everybody been buying small pigs to raise to be marketed, so they were paying bigger price, and less hogs, while the middleman or hog raisers were paying higher prices for that particular small hogs. There were more garbage for the pigs at that time.

The Court: What is the average weight of hogs that go to slaughter—at that time?

The Witness: About 250, 300 pounds, about

(Testimony of Susumu Minami.)

that. I have been keeping about 350 pounds. Smaller hog raisers, they used to keep smaller hogs.

The Court: Well, I didn't mean to carry on any cross-examination, but I want it cleared up as to what the [305] witness is testifying.

Q. (By Mr. Anthony): Was there a shortage of young pigs at that time?

A. Yes, because they were using for kaluas and roasting pigs, you know, Hawaiian style kaluas.

Q. Was there plenty of garbage available for feeding them?

A. Yes, there were plenty because all the soldiers used to camp here and there. They were buying hogs for feeding the pigs.

Mr. Anthony: No further questions.

Examination

By the Court:

Q. About what is the weight of a pig, average, normal, at the time it is weaned from the sow to go on its own?

A. About thirty, thirty-five pounds.

Q. As heavy as that? A. Yes.

Q. Well, then, about how old would they be then? A. About three to four months.

Q. And about how old would they be at the time they increased their weight to 50 pounds, about a month?

A. Well, as soon as they are weaned, they lose weight.

Q. Yes.

(Testimony of Susumu Minami.)

A. It takes about another two months. [306]

Q. How long would it take to make up the next 15 pounds?

A. About two months.

Q. So that a 50-pound hog would be about five months old, four or five?

A. Well, some are fast growing and some slow growing.

Q. Do you breed hogs? A. Yes, we do.

The Court: All right.

Cross-Examination

By Mr. Deuel:

Q. Do I understand, Mr. Minami, that you were in the hog business back at the beginning of the war?

A. Yes.

Q. On this same question regarding the size or the age of a 50-pound hog, when you say that that would probably be five or six months old, are you talking about hogs which are raised such as you would raise them in a regular piggery—whatever the proper word is—where you keep them and feed them regularly, and so forth?

A. Well, at that time there were plenty of feed, swill; well, any place will grow as fast as my piggery or any other piggery.

Q. Supposing instead of being in a piggery and having all this swill that you are talking about the hogs, or pigs, were in an area such as one of the valleys around the island [307] here, a large area, where they weren't penned up and kept as you us-

ually keep them in a piggery, but just had freedom to roam all over the country there, and would come in and get some food that was put out to them each day; would those pigs grow as rapidly?

A. Well, they won't grow as much as—but——

Q. You stated, I believe, that OPA price control came in in July, 1942; is that your recollection?

A. Yes.

Q. Do you recall whether or not there were any other price regulations before that? Did the Army put some regulations in?

A. Well, I don't remember.

Q. You don't remember.

The Court: What was the price fixed by the OPA in July, 1942?

The Witness: I have that paper over there (indicating).

Mr. Anthony: Is this your memorandum? (Handing paper to witness.)

The Witness: Yes. One seventy-five and less, no set prices were set on that; 175 to about 240 pounds, 22 cents; 240 to 275 pounds, 21 cents; 275 to 300 pounds, 20 cents; 300 and over, about 18 to 19 cents.

The Court: How much did you say for 275 to 300? [308]

The Witness: Twenty cents.

The Court: Twenty cents. They come down, then?

The Witness: Yes, as the pigs get heavier, you pay less for them.

The Court: Over 300 pounds is what?

(Testimony of Susumu Minami.)

The Witness: About 18 to 19 cents, and sows——

The Court: That is a hog on its feet, is it?

The Witness: Yes, on the hoof.

The Court: Before it is dressed?

The Witness: Before it is dressed, on the hoof.

Q. (By Mr. Deuel): I understand you to say that the value, or price, of a 175-pound hog was 22 cents a pound? A. Yes.

Q. A minute ago you stated that a 175-pound hog was worth about \$60; is that what you said, 50 or 60 dollars?

A. Yes, about 50 or 60 dollars. That is the average.

Q. Well, if you multiply 175 pounds by 22 cents, don't you get \$38.50?

A. Well, 175 to 240 pounds.

Q. I am talking about a 175-pound hog.

A. Well, I was figuring as an average about that, when the OPA came in, but the first six months of 1942 they were paying higher price than this OPA price.

Q. But you said you didn't know whether there was any price control during that period or not.

Mr. Anthony: He didn't say that.

Mr. Deuel: I would like to read back his answer.

Mr. Anthony: He said there wasn't any price control.

Mr. Deuel: In response to my question he said he didn't know.

Mr. Anthony: No, your question was, Did the

(Testimony of Susumu Minami.)

Army put in any regulations; and he said he didn't know.

Mr. Deuel: That's right. I asked him if he knew whether or not there were any other regulations before OPA and he said he didn't know.

The Court: Did the Military Governor fix a price on pork and hogs?

The Witness: Not before the OPA.

The Court: Well, he didn't afterwards.

Mr. Anthony: Yes, he did afterwards, your Honor. That is the point. They appointed the OPA as the advisor to the Military Governor and the OPA would do the work and the General would put out the orders. I can show the Court the order, if you are interested in that.

The Court: I have a recollection of an order fixing the price, but I thought certainly it must have come before the OPA took charge under the law and authority of the Federal Government. You say it came after?

Mr. Anthony: Are you talking about the hogs alone, your Honor, or the general price fixing?

The Court: I was thinking about OPA as a general price fixer.

Mr. Anthony: The OPA on the Mainland, of course, came into existence shortly after the first War Powers Act, which was in March, I believe, of 1942.

The Court: Well, I remember there was some delay in getting it extended to the Territory here.

Mr. Anthony: That's right.

The Court: But I assumed that after the OPA

(Testimony of Susumu Minami.)

took charge of price fixing here that the Military Governor didn't bother with it any further.

Mr. Anthony: The first person who came down here was an administrator by the name of Carl Borders, and he was appointed by military order as price fixer and advisor to the Military.

The Court: Yes.

Mr. Anthony: I can get the date of that.

The Court: He was not official OPA, under the OPA set-up.

Mr. Anthony: Well, he was sent out here that way, but he didn't wind up that way when he got out here. When he got out here, he became an advisor to the Military Governor.

The Court: That is hard to digest.

Mr. Anthony: Well, I can show you the record. In [311] fact, I can step in the Clerk's Office and get it, I think.

The Court: Well, never mind.

Q. (By Mr. Deuel): Mr. Minami—

A. Yes.

Q. I believe you stated that you considered a 50-pound pig to be worth 25 to 30 dollars at that time; is that right, is that what you said?

A. The first six months of 1942.

Q. And then you state that a 175-pound to 250-pound hog, you took an average, was somewhere between 50 and 60 dollars? A. Yes.

Q. Now, you are a pig raiser; could you afford to buy a 50-pound pig for 25 to 30 dollars and take care of it, feed it, and so forth, until it got up to

(Testimony of Susumu Minami.)

that average, in between 175 and 250 pounds, and sell it for 50 or 60 dollars?

A. Well, when the OPA came, we can't help it.

Q. I asked you whether you could afford to buy those pigs at that price and carry them up to the larger size.

A. Yes, we do, and we doing it now.

Q. Can you make money on that?

A. Well, sometimes we got to lose and sometime we got to make.

Q. How long does it take to raise a pig from 50 pounds up to 200 or 225 pounds? [312]

A. It takes about six or seven months.

Q. In other words, you have to at least double his age then? A. Yes.

The Court: You don't mean you are paying that much for 50-pound pigs now?

The Witness: Not as much as that. During the strike, yes, we used to pay.

Q. (By Mr. Deuel): Mr. Minami, when you speak of those pigs being worth the price that you stated, you are speaking of somebody's having them in a pen so you can go and get them there?

A. Yes, we buy from the other hog raisers.

Q. Or deliver them to you, either one?

A. Yes.

Q. Were you born and raised on this island?

A. Yes.

Q. You know the whole island fairly well, been around it? A. Yes.

(Testimony of Susumu Minami.)

Mr. Deuel: May I have the map, Joint Exhibit A. (Handed to counsel.)

Q. (By Mr. Deuel): I presume, then, that you know the northwest end of the island, somewhat up toward Kaena Point. Do you know where Makua Valley is, this area right here [313] (indicating)? A. Yes, I think I do.

Q. Now, then, from your experience as a pig raiser, supposing that there were a number of pigs in this valley, ranging, various sizes, but an average of about 50 pounds, and they were not penned up here but they were running all over the valley, they were a domestic type pig and would come in to get food that was thrown to them, but they weren't kept enclosed and they had freedom to roam all over; supposing you were to consider those pigs, not as penned up so you could go pick them up or have them delivered to you, but had to round up those pigs yourself, what would you consider the value that way? It would cost you some money, wouldn't it, to round them up?

A. I don't pay extra for the rounding up of hogs.

Q. Would you pay the same price for them scattered all over the valley there with 2500 acres that you would if they were delivered right down in a pen to you—if you had to go out and catch each one of them?

A. Well, I won't pay, if I am going out and rounding up the pigs, but most of the hog raisers, they put altogether, and I look at the pigs.

(Testimony of Susumu Minami.)

Q. That is the basis on which you set your price? A. Yes.

Q. That you estimate they are worth 25 or 30 dollars, [314] that you can go and get them from a pen? A. Yes.

Q. That is what is usually done? A. Yes.

Q. Now, I mean, if you had to go to all this trouble, they are out in this big area, you wouldn't pay as much for them, would you? A. Yes.

The Court: Would you buy them sight unseen out in the woods or brush? Would you buy hogs that way?

The Witness: Well, I got to see before buying the pigs.

The Court: You would have to see every one of them?

The Witness: Yes.

The Court: At close quarters?

The Witness: Yes.

The Court: You don't buy hogs out running around all over the country?

The Witness: Well, I got to see the pigs.

The Court: What?

The Witness: I got to see the pigs before I buy.

The Court: Well, they generally bring them to you don't they?

The Witness: No, you go to the piggery.

The Court: Or you get them from a pen? [315]

The Witness: Yes.

The Court: Well, you don't know how much it

would cost to gather these pigs in and put them in a pen?

The Witness: No, I don't.

Mr. Anthony: No questions.

ADRIAN SILVA

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Sit down.

Direct Examination

By Mr. Anthony:

Q. What is your name? A. Adrian Silva.

Q. Silva? A. (Spelling) S-i-l-v-a.

Q. Are you a cowboy?

A. I used to be on a ranch. I do part time work for McCandless Ranch every time I have the chance.

Q. On this island, at Waianae?

A. That's right.

Q. How long did you work down there?

The Court: Where was your home?

The Witness: At Waianae.

The Court: Waianae Village?

The Witness: That's right. I live at Mailu.

The Court: I mean at the time you worked for McCandless.

The Witness: At Waianae.

Q. (By Mr. Anthony): Were you working for the McCandless Ranch after the blitz?

(Testimony of Adrian Silva.)

A. I was working at Pearl Harbor, but I used to go down there Saturdays and Sundays on my day off. I worked there before the war. I started when I was about ten years old fooling around with ranching.

Q. And were you down there frequently in 1942? A. That's right.

Q. Did you see.

Mr. Anthony: Withdraw that.

Q. (By Mr. Anthony): What did you observe in regard to the fencing of the paddocks in that ranch?

A. What do you mean, before the war? Right before the war?

Q. Right before the war.

A. Well, they were all fenced off in paddocks.

Q. What valley are you referring to?

A. Makua, right in Makua Valley, up to the forest.

Q. And did the ranch operator have any difficulty in finding the cattle and getting cattle whenever they were needed?

A. No, because they were set in paddocks and when he [317] wanted them, they were there in the paddocks.

Q. How many paddocks was Makua divided into?

A. There were quite a few. There were some small ones, and—oh, I say five or six maybe. They were set off in different paddocks, see. There were some small paddocks and some big paddocks. On

(Testimony of Adrian Silva.)

the lower end we had small paddocks; on the upper end we had big paddocks.

Q. What happened to the fences on the McCandless Ranch after the outbreak of war?

A. Well, I noticed they were all torn down. Most of the fences are down.

Q. Did you see any troops there?

A. Yes, I did; tanks and everything.

Q. Did they have roads across the ranch?

A. We had one road leading up to the forest. During the war they made quite a few roads in there, across the valley.

Q. Who made the roads?

A. The Army did.

Q. And did the roads go right across the paddocks and through the fences?

A. Yes, that's right. We had one road up to Punapohaku, up to the forest side. We didn't have no road; all we had was a horse trail and they made a road up there that is going over to Kuaokala side.

Q. Can you state whether or not the Makua paddocks were [318] stock proof?

A. Yes, they were.

Q. That is just prior to the war?

A. That's right.

Q. Now, subsequent to the outbreak of war, what happened to those paddocks?

A. Most of them were torn down, fences all broken, tanks go through them, corrals were all broken.

(Testimony of Adrian Silva.)

Q. Do you know what was done with the corrals, the timbers in the corrals?

A. Well, they used most of the stuff for firewood.

Q. The soldiers did? A. That's right.

Q. Did you observe any firing in and about that ranch?

A. Makua, yes, there were quite a lot of firing, nearly every day of the week. They were bombing practice in Makua; planes were strafing the place.

Q. When was that?

A. During the war. I think it was 1942 on. I am not too sure on dates, but 1941, 1942 on submarines around there.

Q. Did this firing have any effect on the cattle?

A. Yes, sir, they did kill a lot of cattle in their bombs.

Q. Were the cattle frightened, or didn't they mind this [319] firing and shooting?

A. Oh, surely they were frightened.

Q. What would happen to them when the shooting would occur?

A. Well, when they were bombing and strafing the place, any cattle in the way would get killed.

Q. Did you ever observe the——

Mr. Anthony: Withdraw that.

Q. (By Mr. Anthony): Do you know whether there were any pigs on the McCandless Ranch?

A. Yes, there were.

Q. Were the pigs ever fed by the ranch hands?

(Testimony of Adrian Silva.)

A. Yes, they were fed.

Q. Where were they fed?

A. They had a corral and paddock there and feed them, call them in by a bell.

Q. What valley?

A. Right in Makua near the ranch house.

Q. And when this bell was rung, they would come in; is that right?

A. Yes, they would, that is right. Some of them were kept home in the corrals, in the pens there, some sows, some of them were kept home and some boars were kept home.

Q. You mean they were locked up?

A. Yes. [320]

Q. And couldn't get out? A. Yes.

Q. The great majority of them?

A. They were out and in the evening they were called in by a bell.

Q. And they were fed at night?

A. That's right, they were fed.

Q. Is that right? A. That's right.

Q. They were domestic pigs, were they?

A. They were domestic pigs, yes.

Q. Do you know what happened to those pigs?

A. I don't know what happened to them, scattered all over Makua.

Q. Do you know whether or not any of the soldiers disposed of them?

Mr. Deuel: Objection.

A. Well——

(Testimony of Adrian Silva.)

Mr. Deuel: Just a minute. The witness stated he didn't know what happened to the pigs.

The Witness: They scattered all over Makua. They got loose. Army got in there, see.

Q. (By Mr. Anthony): But you don't know what happened to the pigs?

A. No, I don't know what happened to the pigs. All [321] I know they got loose in Makua; that is all.

Mr. Anthony: No further questions.

Examination

By the Court:

Q. Who got loose, pigs or soldiers?

A. Pigs and soldiers, too.

Q. Well, the pigs were running loose, didn't you say?

A. They were in Makua. They took over the place. Pigs had no chance to come home. Everybody had to move out of Makua; so did the foreman who was taking care of the pigs.

Q. When did this happen?

A. Right during the war, right after the Army took over Makua.

Q. Were you living there at the time?

A. I was born and raised at Waianae.

Q. I know, but Waianae is quite a ways.

A. I go down in that district all the time.

Q. All the time; did you work there day after day?

(Testimony of Adrian Silva.)

A. Week-ends I used to go there. I know the condition of the place.

Cross-Examination

By Mr. Deuel:

Q. Mr. Silva, do you remember the dates quite well, right back in 1941 and 1942, when these various things happened?

A. No, I don't remember dates. [322]

Q. You are a little vague?

A. That's right. I know what happened, but I don't remember dates.

Q. You spoke of having seen a number of troops come in there? A. That's right.

Q. Isn't it true that when those troops came in was really late in 1942, that is, they didn't come in right at the beginning of the war, except a few along the beaches; isn't that right?

A. Well, I tell you, the day of the blitz they start moving on Waianae.

Q. I am talking about down in Makua, though.

A. All over the area, Makua and all.

Q. Were you down there at that time?

A. At Waianae, yes, I was.

Q. I am not talking about Waianae; I am talking about Makua.

A. I been there, yes, the same week.

Q. Weren't the troops just a few troops along the beach area?

A. Yes, scattered all over the beach.

Q. That is scattered around the beach, though;

(Testimony of Adrian Silva.)

there weren't very many troops there, were there?

A. I couldn't remember. [323]

Q. I mean right at the beginning.

A. Well, they were scattered all over.

Q. You are kind of vague as to when more activity came along there?

A. Well, each day that went by there were more there.

Q. But that was sometime later on, wasn't it?

A. Not much later on.

Q. You stated that some cattle were killed up there by some shooting? A. That's right.

Q. Were you up there, and actually see?

A. I tell you, we had permission, when they weren't firing, to ride up in that area.

Q. To go and get some out?

A. Ride up in there. Well, you can see them all over the place and you can smell them.

Q. You didn't actually see any shot?

A. Yes, you can see them.

Q. You didn't actually see any shot?

A. No, nobody can be in there but soldiers.

Q. I would like to refer you to the map which is here beside you, which is Joint Exhibit A. This is the Makua area shown here with the designation Lease No. 1740 written on it. Up at the Mauka end of it was the borderline between the McCandless Ranch area and the forest reserve. [324] Are you aware of that? A. Yes.

Q. And you knew there was a fence along there?

A. Yes.

(Testimony of Adrian Silva.)

Q. Isn't it a fact that that particular fence was not stock proof at the time the war started, that it was an old fence and stock could get through it, and there were cattle up in this forest reserve?

A. Well, I tell you, we drove in there before the war and there were no cattle in there. That fence was OK. We checked up that area there, all that area there. We used to work up this area and we used to hunt in there; no cattle.

Q. You didn't see any up in here (indicating)?

A. None in the forest reserve. That fence was OK.

Q. You said that the ranch area itself was broken into paddocks? A. That's right.

Q. That was by a system of fences going across—— A. That's right.

Q. (Continuing): ——at right angles? And had that fence been entirely completed or were they in process of building?

A. It was all completed, had fences right across here (indicating). This is a ridge (indicating). Had a fence right across here (indicating). This is a forest fence here [325] (indicating). This is paddock, and this paddock, another paddock in here, another paddock in here, too. (Indicating.)

Mr. Deuel: I think that is all.

Mr. Anthony: Do you know the Sergeant who testified this morning?

The Witness: Yes, I met him up at Schofield stables.

(Testimony of Adrian Silva.)

Mr. Anthony: Did you ever see him down at Makua?

The Witness: Well, I tell you, I didn't know him then.

Mr. Anthony: No further questions.

Examination

By the Court:

Q. You say they called the hogs in in the evening? A. That's right.

Q. And fed them? A. Yes.

Q. What did they feed them? A. Swill.

Q. Where did they get the swill?

A. Well, that part, I think he got it from around the camps around there, and were anxious to give them middling, mix it up with water and feed them up with that. The grain——

Q. What kind of grain?

A. I think it was barley, corn, and middling. I am pretty sure of that. [326]

Q. You never helped feed the pigs?

A. What was that? No, I never monkeyed with pigs. I worked with cattle.

Q. Every day they fed all the hogs that came in?

A. That is right. They had a big bell outside, and ring the bell.

Q. About how many hogs?

A. Well, I tell you, there were so many around we never bother to count. I never bother counting and I couldn't say.

Q. You couldn't estimate?

(Testimony of Adrian Silva.)

A. No, I never bothered with pigs. The cattle, maybe I could tell you that.

Q. Well, how many cattle were there up there?

A. Well, that part I couldn't say, too. I wouldn't say. There were so many in there we never count them. I say way over a thousand head or up maybe.

The Court: All right. I guess everybody is through with the witness.

Mr. Anthony: Excuse me, your Honor. We are finished with the witness. Thank you very much.

(Witness excused.)

Mr. Anthony: Mr. Marks, will you take the stand, please.

ALFRED LESTER MARKS

recalled as a witness on behalf of the Plaintiff, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Anthony:

Q. You have already been sworn, have you not, Mr. Marks? A. I have.

Q. You heard the testimony of the Army fellow who testified in regard to improvements—No, he was a civilian employee of the War Department.

A. Civil engineer in the Army. Yes, I did.

Q. Relating to improvements placed on the McCandless property? A. Yes.

(Testimony of Alfred Lester Marks.)

Q. Will you please explain that to the Court.

A. The improvements that were replaced were the houses of the employees and other facilities that had been located on the fee simple land of the McCandless Estate, and although we put in a request to move the house that we had been living in down on the beach——

Q. That is the house that was on the leasehold premises?

A. The house that was on the leasehold, we had negotiated for an exchange of that house for a similar house in Kona and the county of Hawaii had taken possession of the other [328] one. So, knowing that there would be no difficulty there, we included this permanent improvement on the leasehold in the list that we wanted moved. It was not moved, however, and the house was destroyed by bazooka practice; the other facilities were facilities that were put in in substitution for the facilities that we had on our fee simple land.

Q. What happened to that fee simple land ultimately?

A. That fee simple land was condemned under Civil 435, I think it was, and that was within the last two months concluded.

Q. And you reached a settlement for that condemnation by compromise, a compromise figure?

A. That is correct.

Q. In the process of that you included all items of improvements to real estate on that land; is that right?

A. I did.

(Testimony of Alfred Lester Marks.)

Q. That is, as far as your thinking was concerned?

A. In compiling the figure that they asked me to bring in, I took all of those matters into consideration.

Q. You had a substantially higher figure than that that the Government was willing to offer originally? A. We did.

Q. You finally reached a compromise, adjusted figure? A. We did.

Mr. Anthony: I think that is all. [329]

Cross-Examination

By Mr. Deuel:

Q. Mr. Marks, with regard to improvements, in addition to those which were built in the Ohikilolo property, was there not also a house built here in town someplace by the Government for you on the McCandless Estate?

A. There was a small square house made out of canec that was put up at the McCandless residence to house the furniture and other facilities, that was our personal effects that were taken out of the McCandless, our house at the beach at Makua.

Q. That was in conjunction, then, with this whole deal down there? A. It was, yes.

Mr. Deuel: That is all.

Mr. Anthony: No further questions.

Mr. Deuel: Excuse me.

Q. (By Mr. Deuel): From your experience in contracting, and so forth, will you give us an esti-

(Testimony of Alfred Lester Marks.)

mate of the fair value of that house, or building, that was built here in town?

A. I would say that \$200 would be tops for it.

Q. Could you put that up for that?

A. I don't think I would put it up. This type of structure is a very temporary type. You can almost stick your elbow through the wall if you lean on it heavily. In [330] fact, most of the construction work that they did in substitution, they substituted a couple of water tanks for us that we have had to rebuild twice since they put those in at Ohikilolo, and the canec houses that were built have a life of not exceeding four or five years, so it is a little hard to evaluate a temporary structure that is put up under the exigencies of war.

Q. You did state, however, did you not, that in so far as the improvements which were put up there at Ohikilolo by the Government, that in making a hasty calculation, that in normal times you could have done it for roughly one half of a figure between 23 and 24 thousand dollars?

A. \$23,000 was the figure that was mentioned by one of the Congressmen and I told them that in normal times I could do it, I thought I could do it. That was just a curbstone estimate, not knowing the measurements or the amount of material that went into it, and I think that the testimony of the civilian employee who gave a cost of \$16,000 at the time, or a value of \$16,000, would represent a fair evaluation of what they put in.

Mr. Deuel: That is all.

Mr. Anthony: No further questions.

(Witness excused.)

Mr. Anthony: That is our case, your Honor. We rest.

Mr. Deuel: We have no rebuttal witnesses at this [331] time, your Honor, but I understand we are going to adjourn, or recess, until we can get Mr. Rainy.

The Court: Have you any idea how long that will take?

Mr. Deuel: I don't know whether Mr. Anthony wants to take care of it or whether he wants me to, but I have a letter from the doctor who is taking care of him and have his name. I can write to him and ask him what the earliest date he estimates will be that Mr. Rainy can travel.

Mr. Anthony: Your Honor, we are not particularly anxious one way or another. We did want to get him. We telephoned over for him. We are perfectly willing to use his testimony that he gave me for the House of Representatives, and we could close the case.

Mr. Deuel: I object to that, your Honor, for two reasons. First, in that hearing there was no representation there on the part of the Government, so his testimony is not subject to cross-examination. Secondly, his testimony in that case was very brief, and principally he merely corroborated and said that what Mr. Marks had said was true. I certainly don't see why the McCandless Estate, this man having been their foreman and man best in-

formed out there, would not be glad to have him here. All the Government wants to do is bring forth the true facts.

Mr. Anthony: We said we want him. We tried to get—— [332]

Mr. Deuel: The man has some information that I am sure will be helpful, your Honor. I have talked to him.

The Court: Then, not knowing when you can get the witness here, the Court is unable to set down a time.

Mr. Deuel: I can get off an air mail letter this afternoon and should have a reply——

The Court: As far as I am concerned, there is no immediate hurry or rush about it, but I was just going to mention that I can't set down a time for the continuation of the case. We will simply have to pass the thing until it is moved on by someone who has information as to when we can go ahead.

Mr. Anthony: Of course, that is not very satisfactory to us, to try this case and then sort of let it die a natural death. I don't see why Mr. Deuel hasn't made arrangements. I don't see why he can't do it between now and Monday and come in and tell the Court when the man can get down.

The Court: I understood from what Mr. Deuel said he had subpoenaed this witness, not knowing his incapacity, to be here, and I assume that that came as a surprise to him.

Mr. Anthony: We told Mr. Deuel.

The Court: He had a right to rely on the ful-

fillment of the subpoena. When did he go to the hospital?

Mr. Deuel: According to the letter that was in [333] my file, the doctor wrote back and said—I have it here. I will refer to it.

The Court: Do you know, Mr. Marks?

Mr. Marks: Approximately three weeks ago.

Mr. Deuel: This letter——

The Court: Just a moment. What was the extent of his injuries?

Mr. Marks: A badly injured ankle, as I recall it.

The Court: Fell off a horse, or what?

Mr. Marks: That is my—He is working up at Kapapala Ranch. He is no longer in our employ.

The Court: But you had word as to what had happened?

Mr. Marks: We sent to the Ranch there on the island of Hawaii to try to get him to come down.

The Court: I would assume in another two weeks or not more than three that we could have the witness here. That would be my off-hand idea, and as soon as we have information that we can have him here, I will be very glad to set the case down for the earliest hearing I can give it. I don't suppose it would take more than half a day unless he creates, by his testimony, something that either party would care to rebut, and that will be the end except the argument in the case. So I can give you a half day. I can make that most any time without interfering with some others.

Mr. Anthony: What I was going to suggest is

that [334] if he is in bed, perhaps we could take his deposition.

The Court: I had thought of that, but, of course, if the witness is available——

Mr. Anthony: That is the point. He is not available.

The Court: He will, presumably, be available within a short time and it would take a week or ten days to get his deposition.

Mr. Anthony: The doctor said three months.

Mr. Deuel: That is not correct, your Honor. The doctor said he might not be able to walk for two or three months, but, as your Honor knows, a man with a broken leg, or ankle, could get it into a cast and after a short period of time could get out of bed and could travel. A deposition, as you have already suggested, is not nearly as satisfactory, and, I repeat, I would think the McCandless Estate, this man having been their foreman, would be glad to have him.

The Court: That is beside the point.

Mr. Anthony: That is entirely beside the point. We want the thing cleared up.

Mr. Deuel: I tried to subpoena him.

Mr. Anthony: We tried to get him before you subpoenaed him.

The Court: Just so the case isn't continued without [335] day, I will continue it until, I will say, the afternoon of March 6, Monday, March 6.

Mr. Anthony: I will be in the Circuit Court of Appeals then, your Honor, in San Francisco.

The Court: Well, when will you be back from the Mainland?

Mr. Anthony: Shortly after that, the following week.

The Court: Can we make it a week later, March 10?

Mr. Anthony: That is entirely agreeable.

The Court: All right. Friday, March 10 at 2 o'clock. That is a tentative setting. The only reason I set it at that date is so as not to continue it without day, and that is subject to change upon any showing that we could finish the trial earlier than that time by mutual agreement, or at some date later.

Mr. Anthony: The understanding is that the case will be submitted on that day, either that or disposed of before that?

Mr. Deuel: I will, your Honor, write an air mail letter this afternoon to this doctor and ask him for a report as to when this man can travel.

The Court: Mr. Anthony, I am not so sure that I understood your comment that the case will be submitted on that date. What I meant to say was if it should happen that [336] that is a little too early, the man couldn't get here that day but could get here a very short time after, I am willing to continue it over until some subsequent date, not too far away.

Mr. Anthony: Mr. Deuel can find that out beforehand.

(Thereupon, at 3:00 p.m. an adjournment was taken until March 10 at 2 p.m.) [337]

CERTIFICATE

I, Lucille Hallam, Official Reporter, United States District Court, District of Hawaii, Honolulu, T. H., do hereby certify that the foregoing is a true and correct transcript of my shorthand notes taken in Civil No. 886, A. Lester Marks, etc., Plaintiffs, vs. United States of America, Defendant, held February 14, 15, 16 and 17, 1950, before Hon. Delbert E. Metzger, Judge.

June 29, 1950.

/s/ LUCILLE HALLAM. [338]

April 3, 1950

The Clerk: Civil No. 886, A. Lester Marks and Bishop Trust Company versus United States of America, for further trial.

Mr. Deuel: We are proceeding, your Honor, this morning; as you recall, the Court had been adjourned to continue in order to get a witness from the outer island, but in view of the fact that he will be delayed, laid up for quite some time, we are proceeding without him and putting on some other witnesses. I will have a point of law to argue in a little while, your Honor, and it might save time if I could call Mr. Marks to the stand for just one point of clarification.

Mr. Anthony: We have no objection to Mr. Marks taking the stand now, if you want to.

Mr. Deuel: It doesn't make a bit of difference—we can't argue that point until the witnesses are on.

The Court: Go on with your witness.

Mr. Deuel: I will call Mr. Richardson.

GEORGE EDWARD RICHARDSON

a witness in behalf of the Defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Deuel:

Q. Mr. Richardson, will you state your full name, please? A. George Edward Richardson.

Q. Your occupation and residence?

A. Oahu Sugar Company, village and ranch supervisor.

Q. Have you lived on the island or in the islands here for many years, Mr. Richardson?

A. Born and raised here.

Q. You have a general familiarity with the entire islands?

A. Well, not the entire islands, but Oahu. I am pretty familiar with Oahu.

Q. Particularly with the area up around Makua, where the McCandless ranch was up to the time of the war? A. I have been out there.

Q. Will you tell us what your familiarity was with the McCandless ranch there at Makua and Kuaokala?

A. Well, I used to go out on weekends and go after wild cattle up in Kuaokala, the top of Makua there. They call it Makuakala. And I have been on several drives in Makua and we did some branding there while McCandless was alive.

(Testimony of George Edward Richardson.)

Q. And about what period of time was this? Was this before the war? [2*]

A. I went out there since 1938.

Q. And then did you continue going out from time to time up until the war and afterwards?

A. Up to the time of the war and after the war.

Q. And you'd go out and work on these cattle roundups or drives, as you say?

A. On weekends, yes.

Q. And during that time, with your activities out there, did you become quite familiar with the ranch areas?

A. Well, not too familiar but I knew my way around.

Q. You were familiar, were you not, that there was a fence in the Makua area at the upper or mauka end of the area, dividing the Makua ranch from the Makua forest reserve? A. Yes.

Q. Can you state what condition that fence was in at the time the war broke out or just about that time?

A. Well, I would say that the fence was not too good. There was holes here and there. I think it was an old fence. It wasn't a new fence. It was an old fence.

Q. And about that period of time and before that, can you state whether or not there were McCandless cattle going back and forth through that fence and McCandless cattle up in the forest reserve? A. That's right.

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of George Edward Richardson.)

Q. You saw them there yourself? [3]

A. Yes.

Q. And would you say there were quite a few cattle up in there?

A. Well, I couldn't say the amount of cattle but there were cattle in and out there.

Q. Scattered groups from time to time?

A. Well, we had to go and round them up in the valleys. Sometimes we would find them and sometimes we would not find them.

Q. During that period of time, of course, you were working with these cattle, and will you tell us what in general was the type of cattle they had out there? Were they high-class cattle or were they scrub cattle or what? How would you generally describe them?

A. Well, I would say that they were inbred.

Q. That was the general herd as a whole?

A. Yes.

Q. Do you know anything about whether or not there was some tuberculosis in the herd?

A. Yes.

Q. When you say "yes" you mean there was?

A. Yes.

Q. Did you observe whether or not among these cattle, particularly those up in the forest areas, whether any of them were unbranded or—— [4]

A. There were some unbranded cattle.

Q. Were those cattle easy to catch? Were they tame or wild or what?

A. No, they were outlaw cattle, I would say.

(Testimony of George Edward Richardson.)

You'd have to be a pretty good expert to catch them.

Q. You spoke of cattle up on the Kuaokala—or maybe I am not pronouncing it right. That is the plateau up about fifteen hundred feet, isn't it?

A. Yes.

Q. And they would catch cattle and bring them down from there from time to time?

Mr. Anthony: I object to that. It is nothing but leading questions here. I think the witness ought to testify what he knows and not have Mr. Deuel do it.

The Court: The question is leading.

Q. (By Mr. Deuel): Will you tell us with regard to cattle up there, how they would go about getting them down from—you said you rounded up cattle and herded them in. How would they go about getting them down from Kuaokala?

A. We took tame oxen up with us from the ranch. There was a small corral. We'd lead these small oxen in the corral and we'd go up for the unbranded cattle. There was some cattle branded, the older cows and some older steers. They were branded. But we went after the cattle that were not [5] branded, and these were wild cattle. We'd get them and tie them to a tree and leave them there for a Sunday, and the next day they would bring them down. They didn't want to bring them down right away because it was tough on the oxen. They tied them up to a tree and brought them down the next day.

(Testimony of George Edward Richardson.)

Q. How would they go about it?

A. Tie a wild bull or wild cow to this tame ox and the ox would bring them down.

Q. Would you say that was easy or not easy a way?

A. We'd call that big game. That was pretty big game. You go out after something wild, and we enjoyed that sport and we ran after the wild cattle.

Q. Well, that method of getting cattle down, was that an economic or was it an expensive method?

A. Well, when McCandless was alive I don't think McCandless minded the expense. We used to go down, between twenty-five and twenty-six of us, go down and sleep Saturday night and McCandless would feed us and go early in the morning. One Sunday we may catch none or ten the next Sunday. That's the way it went from Sunday to Sunday.

Q. After the war broke out, Mr. Richardson, did you still continue at times to go up there or not?

A. The war broke out in '41. I think in '42 I didn't go there any too much because there's too much Army and [6] things were pretty bad to travel back and forth those days. I didn't go too much in '42. But I do think I went down in '43.

Q. '43?

A. Yes. It was pretty hard traveling in those days when the Army was here. Everything was hot around here. We didn't go down too much.

(Testimony of George Edward Richardson.)

Q. That is, traveling around that section of the island? A. Yes.

Q. You say that you did go down, you think it was along about '43?

A. If I recollect my mind I think it was around '43.

Q. What was the purpose of going down there at that time—the same as before? A. Yes.

Q. You mean by that, to get cattle out?

A. Yes.

Q. On those occasions were you interfered with by the Army?

A. Oh, yes. We were chased out a couple of times.

Q. Out where?

A. Well, we couldn't go up to the Kuaokala unless we went along with the foreman. It was pretty tough around there. [7]

Q. You did, though, go with the foreman from time to time?

A. After awhile we used to go to the PX, after we got acquainted, and go to the PX and drink beer.

Mr. Deuel: I think that's all.

Cross-Examination

By Mr. Anthony:

Q. Where was the PX?

A. Right in Makua, in Keaau. Everything was out at Makua, and they had them in Keaau.

(Testimony of George Edward Richardson.)

Q. There were a good many troops around there, weren't there? A. Very much so.

Q. They had taken over the ranch, more or less?

A. They took over Makua valley.

Q. And can you give the Court any idea how many men were stationed around in that area, in the McCandless ranch? A. You mean Army?

Q. Yes.

A. They were all camped in the kiawe trees, maybe five hundred or a thousand. I don't think I can give you the exact figure.

Mr. Deuel: I think we ought to have the period of time.

Mr. Anthony: After the war broke out? [8]

The Witness: Yes.

Mr. Deuel: What particular period? Because we have a difference here as to whether it is immediately after or later, because it is acknowledged that the Army took over.

Mr. Anthony: Mr. Deuel can take that up on re-direct, if he wants to.

The Court: Well, nevertheless he has the right to insist that you have the time specified.

Mr. Anthony: It was after the war broke out.

The Court: I know, but that is rather vague, "the war broke out."

Mr. Anthony: The war broke out in December, '41, and after the war broke out this witness said he was there, on his direct examination, a little bit in '42 and more frequently in '43.

Q. (By Mr. Anthony): Now, these troops you

(Testimony of George Edward Richardson.)

are talking about referred to what time, Mr. Richardson, the Army troops?

A. Well, I didn't go much in '42 because, as I say, we couldn't travel around too much. Everything was guards here and guards there. But in '43 things got a little more loose and I used to go up more often in '43.

Q. When you did go down there in '42, can you give us any idea how many troops were around there, even though you weren't permitted to move about freely? [9]

A. Well, they were all in the kiawe trees all the way along from Waianae to Makua.

Q. And you don't know how many troops there were?

A. No, sir.

Q. They were all over the place?

A. Yes.

Q. The same was true in 1943?

A. Yes.

Q. Now, you testified as to the wild cattle that were up in the forest reserve and on Kuaokala. Were all of them cattle of the McCandless ranch, on the McCandless ranch, wild cattle, or was that just a few that were up there in the upper reaches?

A. Well, there's a fence up there. They call this fence the Dillingham fence. And we didn't go into the Dillingham place to catch the cattle. We only stayed in what was called the McCandless place.

Q. Well, were most of the cattle on the McCandless ranch wild cattle or were just a few of them wild cattle?

A. Well, all the ones that were unbranded—and there were some bulls up there that I would say

(Testimony of George Edward Richardson.)

would be about ten years old—I figured they were wild cattle, born up there but nobody had corraled them.

Q. Now, were there any pure breds on the McCandless ranch? [10]

A. I know of some Aberdeen Angus that were down below in the kiawes, black cattle. I thought that they were more of the pure bred cattle.

Q. And they were pretty good cattle, were they?

A. Yes.

Q. Did you see any white faces in Makua?

A. Well, yes, there was a few white faces.

Q. What do you mean by white faces?

A. Well, all of the Hereford cattle is white face. But I don't think they were the pure Hereford cattle. There may have been some cross in the breed of Hereford with some other breed.

Q. Now, Mr. Deuel asked you whether you had any information in regard to tuberculosis, and you answered Yes. What do you mean by that, Mr. Richardson?

A. Well, Rainy stated that the cattle were affected by tuberculosis.

Mr. Anthony: I object to that as hearsay.

The Court: That may be stricken as hearsay.

Q. (By Mr. Anthony): Is your information as to tuberculosis based upon your own knowledge, Mr. Richardson?

A. All those cattle were inspected by the Territorial veterinarians, and those that were affected were separated.

(Testimony of George Edward Richardson.)

Q. And your reference to tuberculosis is based upon [11] that inspection and what Mr. Rainy told you, is that right? A. Yes.

Q. You didn't make any inspection yourself?

A. No.

Q. You are the ranch supervisor out at Oahu, are you? A. Yes.

Q. Can you give us an estimate as to the value of cattle per head such as the McCandless cattle in the years 1941 to 1944?

Mr. Deuel: Your Honor, I think that question is rather indefinite for the reason that what we are concerned with here is not a value as to cattle, say, delivered to market or herded up in the corral or what. We haven't found out what he is referring to. It stands obvious in this case that what we are concerned with in this valuation is cattle as existed in the entire ranch in the condition they were in. He is asking a question which will probably lead to an answer of cattle delivered to market or at least delivered to a corral rather than picked up.

Q. (By Mr. Anthony): Assuming cattle were in a corral out there at Makua, would a hundred dollars a head be a fair price for such cattle?

A. Well, I am a salesman myself. In selling an animal it all depends what you want for that animal, in selling an [12] animal. If I figure my animal is worth one hundred fifty dollars, I am going to ask one hundred fifty dollars for my animal. And if the buyer does not give me that price, I wouldn't sell my animal. It may be off the record. Frequently

(Testimony of George Edward Richardson.)

I see the manager of the Waianae plantation there, and he came up there once and I had some of my own cattle and he wanted to give me seven cents on the hoof. I told him I wasn't broke yet. Seven cents on the hoof is a cheap price.

Q. What is the average weight of the steer?

A. It always depends how old your steer is and what kind of paddocks you have.

Q. And you set the price?

A. Of course in the stock market they have a scale for your price, but some people don't go by the scales. They have been selling black market here, all kinds of prices for cattle.

Q. Well, would you say a hundred dollars a head was a fair price for the McCandless cattle average?

Mr. Deuel: Objection. This particular line of questioning is not proper cross-examination here. If he is making him his own witness, why, he is definitely asking him leading questions.

The Court: Well, I think it is outside of the range of the direct, of the cross. Of course, you can make the [13] witness your witness.

Mr. Anthony: Well, I'd like to make him my witness. The man is here on the witness stand, your Honor. If he knows anything about it, I'd like to have the Court have that information.

The Court: Yes.

Mr. Anthony: I'd like to ask him the question as my witness.

The Court: All right. As your witness, you may go ahead.

(Testimony of George Edward Richardson.)

Mr. Anthony: Mr. Richardson, will you answer the question?

Mr. Deuel: My objection still stands, your Honor. Mr. Anthony suggested the price to him there. I think if he wants——

The Court: Well, why didn't you object to that? It was leading anyway.

Q. (By Mr. Anthony): What would you say is a fair average price for McCandless cattle during this period we are talking about, Mr. Richardson?

A. Well, you want to put it at that time?

Q. Yes.

A. Cattle has jumped up double since then. I don't know. Maybe I would ask one hundred twenty-five a head. [14] I mean it is up to the individual what their——

Q. I'm not asking you what you'd ask. I am asking you what were cattle selling for then.

Mr. Deuel: Your Honor, I don't believe that Mr. Anthony has properly qualified the witness for this line of questioning as yet. He assumes that he knows the market as a whole. And for that matter, he didn't definitely relate it back to the time which I am assuming that he means, to 194——

Mr. Anthony: Well, I will withdraw the question. Let's get on with the case.

Q. (By Mr. Anthony): Have you ever roped any bulls out there? A. Yes.

Q. And were they good, strong bulls?

A. Yes.

(Testimony of George Edward Richardson.)

Q. How many cowboys were required to rope one of those?

A. To have nobody get hurt would put three or four ropes on one bull.

Q. Now, on the McCandless ranch how many ropes did you have when you were roping a bull?

A. I am talking about the McCandless ranch.

Q. So those bulls were pretty good, were they?

A. Yes. [15]

Q. Can you give us any idea how often you went out there, Mr. Richardson? Was it every week?

A. I would say it was twice a month.

Q. Twice a month? A. Yes.

Q. And that was during——

A. '38, '39, '40.

Q. Then in '42—'41? A. Early '41.

Q. In '42 approximately how many times did you go out there?

A. I don't know whether I went out once or twice in '42.

Q. And in '43 how many times?

A. Well, I would say once a month, maybe once a month in '43.

Q. Mr. Richardson, were you familiar with the fact that there was fencing done in Makua valley in the latter part of 1941? A. Yes,——

Q. In other words,——

A. ——early part of '41 up to the latter, that's right.

Q. The testimony thus far is, towards the latter part of '41. [16] A. Yes, yes.

(Testimony of George Edward Richardson.)

Q. Now, that would prevent the cattle, if those fences hadn't been broken, from getting up into the forest reserve, would it not?

A. I believe that is a new set-up they planned there. There was no fences in there in Makua, but they were going to improve the place and make four paddocks, and one fence went straight from the ocean up to the mountains. I am not too sure whether the side fences were all through, but I know the main fence going up was through. It could have been through while I didn't go there.

Q. And when you were talking about the holes in the fence, you were referring to the period before the war, were you not?

A. Well, that's the old fence, forest fence. This is the forest fence I am talking about with the holes in it.

The Court: Well, that forest fence, was it made over or wasn't it?

The Witness: I am not—I don't think so. There was holes in there, and they could have fixed it. I am not too familiar with that.

The Court: Well, that was rebuilt at the time you were talking about the fences being built?

The Witness: This fence in Makua, that's a new fence. [17] There was no fence there. They made this new fence.

The Court: Well, that had nothing to do with the forest reserve fence?

The Witness: No.

The Court: Well, on these cross-fences to the

(Testimony of George Edward Richardson.)

valley, did they have anything to do with the forest reserve?

The Witness: Well, they could catch their cattle and put it below this cross-section fence from the forest.

The Court: Considerable vacant pasture, then, between the cross section fence and the forest reserve, wouldn't there be?

The Witness: Yes.

The Court: Well, would that have been any plan, to leave a space in there that wasn't being used?

The Witness: I think that was a good idea, to have four paddocks there. They had one open space as it was.

The Court: Well, the mauka paddock would have been bordered on the mauka side by the forest reserve fence?

The Witness: Yes.

The Court: And you say it was in poor condition the last time you saw it, is that so?

The Witness: Yes.

The Court: All right.

Mr. Anthony: No further questions.

Redirect Examination

By Mr. Deuel:

Q. That area that you are speaking of now, is along from Waianae to Maku in the kiawe trees, is that the way you put it, I believe? A. Yes.

Q. Mr. Richardson, you spoke of troops being

(Testimony of George Edward Richardson.)

that close down towards the beach or does it run 'way back into the hills?

A. Along Makua beach and Keaau beach is all kiawe trees on both sides of the road, and the Army was all down below because we couldn't go on top.

Q. What you are talking about, then, is—and relating back to the early days of the war—is that the troops were in the areas near the beach, concentrated there? A. Yes.

Mr. Deuel: I think that's all.

Recross-Examination

By Mr. Anthony:

Q. You also saw them there in '43, didn't you?

A. Yes.

Q. You saw them up on Kuaokala, didn't you?

A. There was an Army camp built in one of the gulches on top of Kuaokala. They were all—I don't know what you call them—fox holes. We had to be careful with our cattle when we ran up there with our horses. [19]

Mr. Anthony: That's all.

Mr. Deuel: That's all.

(Witness excused.)

Mr. Deuel: Call Mr. Yim.

WILLIAM F. YIM

a witness in behalf of the Defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Deuel:

Q. Will you please state your full name?

A. William F. Yim, Y-i-m.

Q. And your occupation and residence?

A. Post Office clerk. I live at 529 Panui Street.

Q. And how long have you lived on this island or in the islands?

A. Well, since I was born to this day on this island.

Q. On this island? A. Yes, sir.

Q. Mr. Yim, have you had some familiarity with cattle and stock? A. A little, yes, sir.

Q. Have you had familiarity with them on the McCandless ranch? You know the McCandless ranch area out at Makua and Kuaokala?

A. Yes, sir. [20]

Q. And did you have familiarity with that area?

A. Yes, sir.

Q. During what period of time?

A. Well, before the war, about 1938 until the war broke out, and we were laid off about a year and one-half and then I went down afterwards.

Q. What did you do out there?

Mr. Anthony: I object to it unless the time is fixed.

Mr. Deuel: I am very happy to have him go

(Testimony of William F. Yim.)

into it. I thought he did say from 1938 on through until after the war broke out.

Mr. Anthony: Well, I object to anything he did prior to the time when the Army took over. That is of no relevance to any issue in this case.

Mr. Deuel: It definitely shows his familiarity with this particular area and with the animals and stock out there and the conditions of the ranch, your Honor. It is in the nature of qualifying him.

The Court: All right. Go ahead.

Q. (By Mr. Deuel): Will you state what you did out there on the ranch and over this period of time from 1938 until up to the war and afterwards?

Mr. Anthony: I object to that as duplicity now. Let's find out when. He can't do all the things at this time. [21] That's about six questions in one. He can ask him if he was out there in 1938 and what he did.

Q. (By Mr. Deuel): Were you in this area of the McCandless ranch in 1938, Mr. Yim?

A. Yes, sir.

Q. And will you tell us what you did out there at that time?

A. Well, I had no particular duties. I just went out there for the sport, cow-punching.

Q. How often did you go out in 1938?

A. Practically every Sunday or every other Sunday. Practically every Sunday.

Q. And what did you do while you were out there on these Sundays in the times you were out there?

A. I was a brush popper.

(Testimony of William F. Yim.)

Q. And were you in these same areas in the year 1939, Mr. Yim? A. Yes, sir.

Q. And about how often did you go out in 1939?

A. Every weekend.

Q. And what did you do out there in 1939?

A. Same thing. Sometimes we had to repair fences, branding cattle.

Q. Drove cattle and repaired fences? [22]

A. Yes.

Q. And did you go out there to this area, in these areas, in 1940? A. Yes, sir.

Q. And about how often in 1940?

A. Every weekend.

Q. And what were you doing out on those occasions?

A. Same thing, branding, chasing wild cattle.

Q. And were you familiar, did you go out to those areas in 1941?

A. Until the war started, yes, sir.

Q. Until the war started? A. Yes.

Q. And about how often?

A. Same, every weekend.

Q. And what were you doing on those occasions?

A. Same thing.

Q. And during this period of time that you have spoken of, did you become quite familiar with the various, the general ranch areas out there?

A. Quite, yes, sir.

Q. Were you from this experience, Mr. Yim, familiar with the fence in the Makua area in the

(Testimony of William F. Yim.)

Makua portion thereof dividing the Makua ranch from the Makua forest reserve?

A. Yes, sir. [23]

Q. And will you state from that familiarity what was the condition of that fence prior to the war and at the outbreak of the war? You are talking about Makua ranch—right?—right in Makua?

A. I am.

Q. I am talking about Makua.

A. There were a few holes there, some pukas.

Q. What was its condition with regard to being stockproof?

A. Oh, cattle can easily go back and forth.

Q. And did cattle go back and forth?

A. I think so. I think so. I think I see hoof marks going over.

Q. What I am getting at is, did you observe cattle from the McCandless estate that were on the Makua forest reserve and had gone through that fence?

A. We had to chase them back.

Q. Did you drive them up in there at various times?

A. We didn't go to the same area every time we went down there.

Q. You say you didn't go in the same area?

A. No.

Q. But what I am getting at is that whether or not you observed cattle up in there, cattle of the McCandless estate, shortly before or about the time the war broke out [24] in the Makua forest reserve?

Mr. Anthony: I object to the continual leading.

(Testimony of William F. Yim.)

There hasn't been a single question but putting words in the witness' mouth. Why doesn't he ask him what he observed instead of Mr. Deuel——

The Court: Reframe it.

Q. (By Mr. Deuel): At these times in 1941 up to about the time of the war, did you observe cattle of the McCandless estate on the Makua ranch?

A. Yes, sir.

Q. And with regard to the location in and about the fence, what did you observe in regard to these cattle?

A. I don't quite understand the question.

Q. You have stated that the fence itself that we are talking about——

A. Makua fence?

Q. Yes, the Makua fence, that is, between the Makua ranch and the forest reserve, had pukas in it, I believe you stated.

Mr. Anthony: He said they had a few holes.

Q. (By Mr. Deuel): What I want to know is what you observed with regard to the cattle in about that fence?

A. Well, when we went up after the cattle we had to [25] go through the holes and try to brush them, find them in the forest range area and drive them back.

Q. You had to drive cattle back from where?

A. The forest range.

Q. From the forest area? A. Yes, sir.

Q. And did that happen many occasions?

A. Three, two or three times, yes, sir.

(Testimony of William F. Yim.)

Mr. Anthony: What was that last answer?

The Witness: Two or three times.

The Court: What year are you talking about now?

Mr. Anthony: What year, the Judge asked you?

The Witness: '41.

Q. (By Mr. Deuel): From your working with the cattle out there, Mr. Yim, can you tell us what in general was the type of cattle that were on the McCandless ranch? How would you describe them?

A. We call them scrub cattle.

Q. And did that refer to the cattle as a whole?

A. Yes, sir.

Mr. Anthony: I move to strike the witness' answer, your Honor, so that I can make my objection. He has no qualifications to give any opinion as to what these cattle are, on his own statements. [26]

The Court: Well, he said they called them scrub cattle.

Mr. Anthony: He said "we call them."

The Court: You might find out from the witness what other cattle, type of cattle, he is acquainted with.

Q. (By Mr. Deuel): Will you tell us, Mr. Yim, what in general, what familiarity you have had with cattle? Have you had familiarity with cattle other than these McCandless cattle? Did you ever do any work on cattle ranches or around cattle before this?

A. No, never worked in a cattle ranch before. But I had my own.

(Testimony of William F. Yim.)

Q. You had your own?

A. I had my own cattle when I was in Hawaii.

Q. Do you consider that you have had some familiarity with cattle over a period of years?

A. From going down there that often, yes, sir.

The Court: Say it over again.

A. From going down that often, yes, sir.

Q. Have you worked with cattle enough to know various types of cattle?

A. Not enough, no, sir, not enough.

The Court: Where did you say you had worked elsewhere in a ranch with cattle?

The Witness: I didn't say I worked in any ranch at all. [27] I said I had my own cattle when I was in Hawaii.

The Court: Where?

The Witness: On the Island of Hawaii, Kona District.

The Court: How many cattle did you have?

The Witness: Milking cattle, four cows.

The Court: You have seen the cattle on Parker ranch?

The Witness: Oh, yes, sir.

The Court: Have you seen them on the old Norris ranch?

The Witness: No.

The Court: Have you seen them in the McCandless ranch in Kona?

The Witness: No, sir, I have never been to that ranch. I saw milking cattle down in—

(Testimony of William F. Yim.)

The Court: Have you seen them in the McGuire ranch?

The Witness: Yes, sir.

The Court: On the old Frank Woods ranch?

The Witness: I don't remember that.

The Court: Well, Kahua ranch.

The Witness: Yes, sir.

The Court: Have you seen them on Shipman's ranch?

The Witness: No, sir.

Mr. Anthony: I can't hear what he says, your Honor.

The Court: He said "No, sir" to the last statement. All right. [28]

Q. (By Mr. Deuel): How would you say that these cattle on the McCandless ranch, Mr. Yim, compare with other cattle that you have observed?

Mr. Anthony: I object to that. That is an expert question. He doesn't know anything about cattle. He had four milk cows in Hawaii. It is not relevant anyhow to the issue in this case. He just knows about the McCandless—he has to know about the McCandless——

The Court: Well, he hasn't qualified as an expert, but he has testified that "we call these scrub cattle." Go ahead.

Mr. Deuel: Are you allowing him to answer the question, your Honor?

The Court: What?

Mr. Deuel: Are you allowing him to answer?

(Testimony of William F. Yim.)

The Court: May I have that question?

(The reporter read the last question.)

The Court: No, that is sustained.

Q. (By Mr. Deuel): Mr. Yim, with regard to the cattle that you went out to round up on these areas, how in general would you describe those cattle? A. They are quite wild, sir.

Q. And how were they with regard to being branded? Were they branded or not? [29]

A. Some of them were. Some of them weren't.

Q. And are you familiar with the method of getting cattle down from the Kuaokala area?

A. The wild cattle, yes, sir.

Q. And how was that done?

A. Well, we had a bunch of work oxen which we used to drive ahead of us on the way up the trail. And we had the paddock—corral we called it—and kept them in until—well, if a wild bull was caught we'd take one of these work oxen to the bull and tied them, necks, together, and we let the work oxen take the wild one back to the home ranch.

Q. Mr. Yim, in your experiences working in the McCandless ranch, did you ever have occasion to work on one of their ranches at Waianae, right near Pokai bay adjoining Lualualei?

A. Yes, sir, I worked all the ranches.

Q. You worked there, you say, also?

A. Yes, sir.

Q. And did you work there in 1941? Were you out there in 1941?

(Testimony of William F. Yim.)

A. I cannot safely say whether it was '41 or '40. We didn't go there all the time.

Q. You can't quite remember whether you were out there in '41 or not? A. No, sir. [30]

Mr. Deuel: That's all.

Cross-Examination

By Mr. Anthony:

Q. You went out there as a visitor, didn't you, as a guest?

A. Well, I went down there helping, helping, just to help.

Q. As a guest, weren't you? Did you get paid?

A. No, sir.

Q. You just went out there for fun, didn't you?

A. That's right.

Mr. Anthony: No further questions.

Mr. Deuel: That's all, Mr. Yim.

(Witness excused.)

Mr. Deuel: Your Honor, I see that Mr. Clarke is here now. If we might call Mr. Marks and then Mr. Clarke on this other point——

The Court: All right.

Mr. Anthony: Just a minute. I see that Mr. Clarke is right here now. Your Honor can take his testimony and then he can go back to his office.

JOHN K. CLARKE

a witness in behalf of the Plaintiffs, having previously been sworn, resumed and testified further as follows: [31]

Redirect Examination

Mr. Anthony: You have already been sworn in this case, have you not?

The Witness: Yes.

The Court: I don't recall that he appeared in the case before.

Mr. Anthony: Yes, he did.

Mr. Deuel: Yes, he did, your Honor.

The Court: All right.

Q. (By Mr. Anthony): You have already testified to your familiarity with the McCandless ranch over a great many years? A. Yes.

Q. And I believe you testified as to the value of that ranch land comprising the McCandless ranch?

A. I did.

Q. As of 1942 to '43 and '44?

A. That's right.

Q. You recall what your opinion was as to the value per acre?

A. I believe that the value of three dollars an acre would be a fair figure for it.

Q. And there are some 4,783 acres. That would be approximately \$14,450? A. That's correct.

Q. Would a willing buyer pay that amount for a lease of a short duration like that, in your opinion? A. I believe he would.

(Testimony of John K. Clarke.)

Q. You are quite familiar with ranch properties apart from the McCandless ranch, are you not?

A. I am.

Q. For many years you were connected with the Hind ranch? A. Yes, sir.

Q. That is one of the larger ranches on the Island of Hawaii? A. That's correct.

Mr. Anthony: You may cross-examine.

Mr. Deuel: Your Honor, what I had intended to bring out by recalling Mr. Clarke I believe has been brought out, namely, that he bases his opinion of values on conditions throughout the period of time during the continuation of the 5-year remainder of the term for which it is contended that this lease ran. That being the fact, and his opinion being based not on values at the date of entry, in other words, late 1941, early '42, but on the continuing and changing conditions throughout '42, '43, '44, '45 and '46, I move that his opinion of value be stricken. And in that regard, your Honor, I'd like to cite to you some cases of the Court of Claims in similar matters definitely holding [33] on that point.

Mr. Anthony: Well, your Honor, before we get into any discussion like that,—I think we are dealing with tweedle-dum and tweedle-dee—let me ask the witness some further questions. I don't see any confusion that is conjured up but I think I can meet whatever objection he has by asking the witness further questions, if I may, your Honor.

The Court: Well, start over again.

Q. (By Mr. Anthony): Mr. Clarke, you have

(Testimony of John K. Clarke.)

an opinion as to the value of that leasehold as of December 7, 1941, have you not?

A. Yes, it was worth that money then.

Q. It was worth what?

A. Three dollars an acre, approximately \$14,450.

Q. And that was for the entire remainder of the term?

A. Yes, sir.

Q. As of that date that is the value of that leasehold?

A. Yes, sir.

The Court: Well, had it been worth that year by year preceding that?

The Witness: Of course, there was a change in the cattle business up to that time, and we are receiving a great deal more for a bull than we did previously. There [34] is another factor there. The McCandless estate has quite a little in private holdings. They have other adjacent lands. By combining them, naturally the expense of operation is very much less. Take the cowboy situation alone. It doesn't require so many men. So I believe that area to be worth three dollars an acre, if it had been fenced properly and had been able to rest the various areas it would be worth that money to anybody.

The Court: And to anyone who had cattle?

The Witness: That's right. And they had it.

The Court: Now, when would that be? The testimony shows that it is worth not the next day, the next few days after Pearl Harbor—the Army went in there, a small number to begin with, but there was testimony that they broke down fences and made roads in there to gain access to other

(Testimony of John K. Clarke.)

places and they did some fortifying. Now, without regard to these operations of the Army but just assuming that the Army hadn't gone in there on that day, what, at that time, would have been in your opinion a fair market value of the leasehold, considering that it had only five years to run, and considering that there were improvements there at that time, if you are familiar with them, the condition of the forest reserve fence, and whether or not there was an obligation on the lessee to keep that fence up to keep cattle out of there, what would be your opinion of the fair market [35] value as of, say, the middle of December or thereabouts, 1941?

The Witness: I believe it was worth three dollars an acre.

The Court: You think it would have brought that on the market?

The Witness: I think so.

The Court: Well, that lease terminated that day. No, it didn't terminate. There was a lease, a 5-year lease on it. Now, are you figuring upon the assumption that that lease could have been continued?

The Witness: Yes, I think the chances were very, very fair that it would be continued. It was worth that money as of that date.

The Court: All right.

Recross-Examination

By Mr. Deuel:

Q. As I understand you, Mr. Clarke, in placing

(Testimony of John K. Clarke.)

your value now as of late 1941 or early '42 that you are or are not considering any factors that came about later on, that is, during '42, '43, '45?

A. That's correct.

Q. So I ask you, were you or were you not?

A. I was not.

Q. However, your value that you place there is the [36] same, basing it that way, as though it would be, as though you considered factors later on, is that right? I understood you earlier to testify—

A. Well, the chances were very, very good that the McCandless ranch would secure that lease again. They had it for a long period of time, outside of the period when Frank Woods took it over. But the chances were good.

Q. But what you mean, then, is that it had that value to the McCandless estate?

A. Well, I think it had that value to anybody else.

Q. I don't understand, then, why you bring in this point of the chances being good that the McCandless estate would get it again.

A. Well, it would permit of their feeling that they could bid up to that figure.

Q. What you are getting at, then, is that it had peculiar value to the McCandless estate for that reason?

A. Well, they are having the additional areas around it. Naturally, they were in a position to pay more for it than anyone else.

(Testimony of John K. Clarke.)

Q. On the general market, though, since they were in a position to pay more than others, would it not be true that the value to others on the general market would be less?

A. No, I believe any other ranch would pay that [37] figure.

Mr. Deuel: At this point, although Mr. Anthony doesn't think so,—

Mr. Anthony: I'd like to examine the witness if you are finished. I don't like this idea of arguing questions of law in the middle of taking testimony. Are you finished?

Mr. Deuel: Yes, you take the witness:

Redirect Examination

By Mr. Anthony:

Q. Mr. Clarke, what was the McCandless estate doing with that ranch prior to the entry of the Army on the premises after the outbreak of war?

A. They were improving it.

Q. And what were you doing with respect to fencing?

A. I went down on two occasions and the area at that time was in one large paddock, which is not the best practice in ranching. Now, I suggested that they cut the area into four paddocks as a start. On my second visit they were then putting in the fences.

Q. And was that completed prior to the end of 1941?

(Testimony of John K. Clarke.)

A. I believe it was. I didn't go down again, but I believe it was.

Q. And what was the result of that operation insofar as the effect on the efficiency of the ranch is concerned?

A. Well, that permitted of the resting of the paddocks, [38] saving of the feed, and made it possible to move the cattle from one paddock to the other, which is an advantage in ranching.

Q. Did it have any effect in connection with the keeping of the cattle in corrals and other areas where they wouldn't get out to the forest reserve?

A. Definitely.

Q. That was one of the purposes of that, is that right?

A. That's right.

Mr. Anthony: No further questions.

The Court: Were those cattle out there store-fed?

The Witness: Just range cattle.

The Court: From the time of birth until they went to market?

The Witness: That's correct.

The Court: Would they be fit to go to slaughter off that range?

The Witness: Yes, yes. The improvement that was put in would naturally help that situation because it permitted of their moving the animals from one paddock to the other and resting.

The Court: Well, what type of grasses were out there?

The Witness: At the time were were improving

(Testimony of John K. Clarke.)

that, too. It was just the natural grasses that were there at [38] the time.

The Court: Improving by clearing?

The Witness: By planting.

The Court: Did they break the ground in order to plant?

The Witness: Yes, they'd have to do that, naturally. But that was the process that was going on at the time, the improvement in that area.

Recross-Examination

By Mr. Deuel:

Q. Mr. Clarke, what was the last time that you were down there in 1941?

A. I don't recall the particular time but it was in '41.

Q. And with regard to this fencing there, putting it there in the Makua area into four paddocks, you say that you think it was completed?

A. I didn't go down again. So in my own knowledge I do not know.

Q. Actually, then, from your own knowledge you do not know on December 7, 1941, what the condition was of the border fence at the upper or mauka end of the Makua valley ranch area and dividing that from the forest reserve?

A. Last time I was down there the fence was in the course of erection. But I didn't go again.

Q. Actually, though, you say you don't know what [40] there was at that time? A. No.

Mr. Deuel: That's all.

Mr. Anthony: That's all.

(Witness excused.)

Mr. Deuel: Your Honor, I wanted to argue this point of law now.

Mr. Anthony: I'd like to argue the law and the facts when we get finished with the evidence, your Honor. Isn't that the way to proceed with the case?

The Court: Well, generally speaking if there is some point of law that would exclude a witness, why, that is a different proposition. I don't know what his point of law is. But I understood that Mr. Clarke and Mr. Marks were both to be examined.

Mr. Anthony: I'd like to put Mr. Marks on the stand. Then he can argue as long as he wants. I would like to get the evidence in of what we have got left of this case.

The Court: Well, I think we had better proceed with the evidence, then.

A. LESTER MARKS

a witness in behalf of the Plaintiffs, having previously been sworn, resumed and testified further as follows: [41]

Direct Examination

By Mr. Anthony:

Q. Mr. Marks, you have already been sworn in this case, have you not? A. I have.

Q. Subsequent to the last hearing in this case, did you make any attempt to ascertain the sales of the McCandless ranch, sales of cattle?

(Testimony of Alfred Lester Marks.)

A. I did.

Q. What was the result of that investigation?

A. The records show that——

Mr. Deuel: Your Honor, I object to this coming in for the reason that again it does not relate to the valuation which we are getting at in this case. Any sales that Mr. Marks might talk about here are sales on the market; it would be cattle delivered to the market, or at least delivered in paddocks where the purchaser would come in and pick them right up. And what we are concerned with there, if there was a damage, is a damage not to the cattle at that point but cattle as they existed over the whole ranch area, some up in the forest reserve, and just as they were on the hoof. And that makes a great deal of difference. What he may have sold them for on the market I do not think has any relevancy and is not proper to this issue.

Mr. Anthony: Counsel is over-impressed by his theory of the case. He evidently thinks the evidence shows that [42] this was nothing but a wild wilderness up there. Your Honor asked the witness whether or not he had any figures.

The Court: Yes.

Mr. Anthony: And I told him at the conclusion of the last hearing to go back and find out his figures. I am trying to get at the evidence.

The Court: Yes.

A. The period from the first of November, 1941, to the corresponding period in '42, which was dur-

(Testimony of Alfred Lester Marks.)

ing the period that we had to get out of Makua, there were 547 head of miscellaneous cattle that averaged forty-five dollars a piece.

Mr. Deuel: How much, Mr. Marks?

A. Forty-five. In 1942 to 1943 period, there were 422 cattle that averaged sixty dollars a piece.

The Court: 422?

A. 422. That averaged sixty dollars a piece. In '43 to '44, there were 271 that averaged seventy dollars a piece.

The Court: Now, just a moment. Where did these cattle come from?

The Witness: They came from the Waianae District. That would be the Makua and the Kahanahaiki area plus the adjacent valley of Ohikilolo-Keaau.

Mr. Deuel: Your Honor, I'd like to interpose a further [43] objection at this point, that he is getting in now to a period much later than the period as to which the damage, if any, would relate, and a period, a war period when prices were acknowledged as going upward.

Mr. Anthony: We are putting on evidence as to the value of cattle. I am trying to tender this to the Court to show what was salvaged after these cattle were chased all over the countryside and sold by the McCandless ranch. And I will prove that they are the same kind of cattle that we are suing to recover for here.

Mr. Deuel: The valuation must relate, however,

(Testimony of Alfred Lester Marks.)

to the date of damage, if any, and not to what they might have brought on the market at a considerably different period of time.

Mr. Anthony: Well, if that were so we'd be suing for the whole ranch, because they took the place over. We are not suing for the whole ranch.

The Court: Are you through with that line of questions?

Mr. Anthony: No, not quite.

Q. (By Mr. Anthony): These cattle that you have referred to here brought prices from forty-five to seventy dollars a head. How do you account, Mr. Marks, for the fact that you fixed a value of a hundred dollars a head for the cattle that have been lost or destroyed by the Army activities in this case? [44]

A. Well, these cattle that we sent to market were just slaughtered. They were not fattened and marketed in the normal procedure. We had to get out of Makua and Kaena and Keawaula and Makuakala, and we concentrated on what we had left in the adjacent valley of Keaau and Ohikilolo. We no sooner got in there, then it was taken over in various parts, a portion of it to quarter the personnel who were in charge of the ranch in Makua, and a large portion of it by the Navy who took over the upper area and established a proving ground for captured weapons. Any time they would capture a new type of shell or a new type of bomb, they would go up there and prove it.

So that the cattle that we sent to market was the

(Testimony of Alfred Lester Marks.)

only thing we could do. It wasn't a normal marketing procedure. It was just salvage. We had to keep, to send some of them to market, to keep them all from starving to death.

Q. Those that you did send to market and derived these sales prices per head were cattle that had been chased all over the country there, is that right? A. That is correct.

Q. What would the price have been had those cattle been marketed in the normal course of ranching operations?

A. I believe it would have been considerably more than this. And also some that were sent to market were some of the good bulls and some of the blooded stock that Mr. [45] McCandless had brought in at various times. You don't reflect the value of a good bull from the sausage meat you get out of it. This was a time of stress, and we were being pinched on all sides and we just had to send these things to market because we had no place to keep them. And that's why I put a figure of a hundred dollars a head on the figure that I put in the claim, as that's what I considered represented the value of those cattle at the time.

Q. Now, as to the value of the leasehold, do you have an opinion as to the value of the leasehold as of the date that the Army entered into possession and took over the ranch? A. I do.

Q. What is that?

A. My figure was eleven hundred twenty-five

(Testimony of Alfred Lester Marks.)

dollars a month, which works out in the vicinity of two dollars an acre.

Q. And what would be the total valuation as of the date the Army took over, during the term of the lease?

A. For the five-year period my recollection is the total is around sixty-seven thousand dollars. It is sixty months at eleven hundred twenty-five dollars a month.

Q. And it is your opinion that a purchaser on the open market would have paid that price for that leasehold at that time, is that right? [46]

A. It is.

Mr. Anthony: No further questions.

Cross-Examination

By Mr. Deuel:

Q. I'd like to clarify this matter, Mr. Marks, with regard to your valuation of the leasehold. When you were on the stand last, the last time you testified with regard to that value, I understood that you were valuing it in consideration of the changing values that occurred throughout this five-year period.

Mr. Anthony: I object to that statement. He didn't give any such testimony.

Q. (By Mr. Deuel): In that case let me ask whether or not that was the way you valued it?

A. No, I don't think it was.

Q. Well, what I want to get at is whether or not

(Testimony of Alfred Lester Marks.)

your valuation then relates entirely to a value as of the date the Army went in or whether it is based on these changing conditions throughout the remaining five-year period?

A. My value was, is the value that a willing buyer would have paid, when that lease was taken over for the remaining portion of the lease. And it is based upon my knowledge of sales and auctions and the demand that existed at the time and prior to the blitz. [47]

Q. Then it does not take into consideration changing conditions after that time, is that correct?

A. No.

Mr. Deuel: That's all.

Mr. Anthony: That's all.

The Court: Have you got figures for average sales of Makua ranch in 1940?

The Witness: In 1940 to '41 the figure was a little over forty dollars.

The Court: What was about the rate that it had been for some years up to that time?

The Witness: I couldn't say. I had nothing to do with the ranching activity while Mr. McCandless was alive.

The Court: Now, tell me, did the Army take over all of the ranch land in the Makua lease?

The Witness: Yes.

The Court: Took it all?

The Witness: Took it all.

The Court: Specifically, took that whole leasehold?

(Testimony of Alfred Lester Marks.)

The Witness: They took the two leases.

The Court: The two leases?

The Witness: The leases were cancelled for use of the Army. The letter of cancellation——

The Court: That was in June, wasn't it?

The Witness: That was in June. They had been in [48] virtual occupation, though, since right after the blitz.

The Court: Been in occupation with notice to you to clear out by what date, now? How much time did they give?

The Witness: Well, we didn't have definite notice to clear out until, I believe, it was around May. We had about a month in which to——

The Court: After notice?

The Witness: After notice to clear out. After that time we had rather hoped that there might be some arrangement whereby we would have a joint occupancy and we would have——

The Court: In fact, they had no lawful authority of any kind to tell you to clear out until the Government turned the lease over?

The Witness: That is correct.

The Court: Cancelled your lease? They had begun no condemnation?

The Witness: They had begun—there was no condemnation on the Government lease.

The Court: They just went in?

The Witness: They just came in.

The Court: Well, by force—all right.

(Testimony of Alfred Lester Marks.)

Mr. Anthony: No further questions.

Mr. Deuel: That's all, Mr. Marks.

(Witness excused.)

Mr. Anthony: We have one more witness here, your Honor. [49] I have one more witness.

The Court: Very well.

RICHARD K. KIMBALL

a witness in behalf of the Plaintiffs, being duly sworn, testified as follows:

Direct Examination

By Mr. Anthony:

Q. Your name, please?

A. Richard K. Kimball.

Q. You were born here in Honolulu, Mr. Kimball?

A. Yes, on Oahu.

Q. And have you had any experience with ranching in this Territory?

A. Yes, I have, sir.

Q. Briefly summarize that, will you, Mr. Kimball?

A. I was born at Haleiwa and from the time I was a little child, I guess, I used to be on the land on the Oahu Railway Ranch, from Kahuku to Waikane. And I worked with Ronald Von Holt for two years at Kahua, from 1931 to 1932. I came to Oahu at that time and leased some land from Libby's at Waipio in which I ran cattle for three or four years and engaged in buying and selling cattle.

(Testimony of Richard K. Kimball.)

Q. Are you familiar with the McCandless Ranch?

A. Vaguely. [50]

Q. Have you ever been down there?

A. I have been past it but I have never been on the property thoroughly.

Q. Are you familiar with the general character of that land in that area, the Waianae area?

A. Yes, I am.

Q. Do you know enough about that land down there to have an opinion as to the value of that land as of December 7, 1941?

A. I wouldn't say I know enough about it to be able to render an opinion on the value.

Q. Well, thank you very much. I won't ask you a question, then. I understood you were. Don't you have an opinion on the value of this land? Did you lease any yourself, Mr. Kimball?

A. Nearby.

Q. In the vicinity?

A. Subsequent to that time I leased some land for our dairy.

Q. What year?

A. In 1944, I think it was, the latter part of '44.

Q. Is that government land?

A. Yes, Territorial land.

Mr. Anthony: Well, that's all. Thank you.

(Witness excused.) [51]

Mr. Anthony: We have no further evidence, your Honor.

Mr. Deuel: Your Honor, it appears now that

Counsel is in agreement with me with regard to the proper valuation date and that being the fact I will not need to press my point as I was going to argue.

The Court: Well, I think I understand the matter that you were going to argue, and the Court is familiar with that principle of law, so that I don't think you need to take time to argue that. Now, I do want argument by way of summing up both sides in this case.

Mr. Deuel: If the Court doesn't mind the interruption, I have a further witness, your Honor. We were putting Mr. Marks and Mr. Clarke on because Mr. Clarke was here, and I thought it would be necessary to argue this point.

The Court: All right. Go ahead.

MANUEL COSTA, JR.

a witness in behalf of the Defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Deuel:

Q. Will you please state your full name, Mr. Costa? A. Manuel Costa, Jr.

Q. And your occupation and residence?

A. Dairyman in Honolulu.

Q. And how long have you lived in the Islands, Mr. [52] Costa? A. Thirty years.

Q. You state that you are a dairyman? Have you had experience also in cattle?

(Testimony of Manuel Costa, Jr.)

A. Well, for twenty-seven years of my life in dairy cattle.

Q. I am speaking of stock cattle.

A. Yes, and few beef cattle, yes, sir.

Q. Has your experience entailed any buying and selling of stock cattle? A. Yes.

Q. And over what period of time?

A. Oh, for the last ten years on beef cattle. On the dairy end for the last twenty-seven years.

Q. And those have been—have those been your principal occupations? A. Yes.

Q. You state that you have lived around here for— A. Thirty years in Honolulu.

Q. During that period of time have you become familiar with the Waianae side of the island, and do you know where the McCandless ranch is?

A. Well, I have never been in the McCandless ranch. I went as far as Waianae. I have never been in the McCandless ranch. [53]

Q. When you say you haven't been, you are speaking of the Makua area? A. Yes.

Q. How much familiarity do you have with that area?

A. Well, I couldn't say anything about the area. I haven't been on the land there.

Q. How extensive, or about how much experience have you had, Mr. Costa, in the buying and selling of beef cattle?

A. Well, as I say, I have been buying and selling beef cattle for the last ten, fifteen years.

(Testimony of Manuel Costa, Jr.)

Q. Does that include buying them so on the ranches? A. Yes, on the ranches, yes.

Q. On the hoof? A. On the hoof, yes.

Q. Now, are you familiar with cattle values dating back to 1941, '42? A. Yes.

Q. From your experience and your knowledge of values as of that time, Mr. Costa, can you state what in your opinion would be a fair average value for a herd of cattle, taking them on the ranch area, the area running up into the mountains, some of the cattle, that is, scattered all over just as they would range, some of the cattle being outside of the ranch area and up into the forest reserve, cattle of a type generally known as scrub type, somewhat inbred, and some [54] tuberculosis in the herd, taking the cattle as a whole, over-all herd, little newborn calves ranging up to the old ones; can you state what your opinion of value, taking them that way, you having to go in and get them, can you state what your opinion of value would be?

A. I have to go and get them. If I have to get the cattle in the forest where they are scattered all around and not knowing just what is in there, I'd pay twenty-five dollars a head in the corral after they are caught, not losing. Then the way I understand to bring them down from the mountains, pinned to an ox to bring them to the highway, why, that takes a lot of work, and the most you could pay for that kind of cattle is twenty-five, thirty dollars a head.

Q. Is that your opinion of a fair market value?

(Testimony of Manuel Costa, Jr.)

A. Yes.

Q. For cattle in that condition?

A. That's right.

Q. At that time?

A. That's right. Of course, in 1944 or '43 I bought some from Mr. McCandless in Kona where there really was odd cattle; there were steers and bulls, they were all mixed, and landed at Kawaihae at eighty dollars.

Mr. Anthony: How much was that?

The Witness: Eighty dollars at Kawaihae. That was [55] from the McCandless people, at Kona.

The Court: You mean on the boat at Kawaihae?

The Witness: They were caught, they were all in the herd, came down from the ranch.

The Court: Were they put on the boat?

The Witness: Brought them down to the boat. They paid eighty dollars for them. I paid eighty dollars for them.

Q. (By Mr. Deuel): That purchase, however, was——

A. In '43 or '44.

Q. And from your experience with cattle values, they were higher than they were in the period we just talked about, in '43, '42?

A. Yes, they were higher.

Q. Did you make any other large purchase of cattle along about 1942 or so?

A. Well, we buy twenty, thirty herds at a time.

Q. Specifically, did you make a purchase from Davis and Cooke, I believe?

(Testimony of Manuel Costa, Jr.)

A. Davis and Cooke, no. I bought it from Nobriga in Hawaii. I bought fifty heads.

Q. How many?

A. Fifty heads at one time. That was back here in '47. But then the price was higher at the time.

Q. To refresh your memory, Mr. Costa, I believe we discussed and you told me of having made a purchase, I thought you said from Davis and Cooke, for four hundred twenty-two head?

A. Oh, well, yes. That was 1945, '46.

Q. Oh, was it that late? A. Yes.

Q. I misunderstood you.

A. It was during the war. No, no, '41, just before the war I bought from Cook's ranch, Allen Davis and Cooke.

Q. Are you sure you remember when it was?

A. Yes, I bought from Allen Davis and Cooke. In fact, I can get the record. I bought four hundred twenty-two heads and they were real bred cows. They were pure breds, most pure bred cows, at sixty dollars a head.

Q. Four hundred twenty-two head at sixty dollars?

A. Four hundred twenty-two head at sixty dollars from Allen Davis and Mr. Cooke.

Q. You termed them pure bred cattle?

A. Well, they were all pure Black Angus.

Q. And did you have to go in and get those on the hoof?

A. No, they were all in the corral. We counted them in the corral at sixty dollars a head.

(Testimony of Manuel Costa, Jr.)

The Court: When was that? [57]

The Witness: Well, I think it was '42. The war was on, the war was on already, '42 or '43, the war was on, I remember. I remember that well, the war was on.

Q. (By Mr. Deuel): Do you recall with regard to that purchase when you were talking to them before they had rounded their cattle up, did they make a estimate of the number of cattle they had?

A. Yes, they made an estimate and after we run up the cattle we were short about forty, fifty head.

Mr. Deuel: You may cross-examine.

Cross-Examination

By Mr. Anthony:

Q. You told us this was first in 1947. Now, wait a minute. First you said it was '47. Then you said it was '46. Then you said it was '41, and then you said it was '42 or '43. Now, I want to know which year this was.

A. Well, for that fact I can get the real agreement where I bought the cattle. I can get the agreement, and we have the books. I never went through the books to know what day exactly it was. But I know the war was on, if I don't make a mistake.

Q. It was after 1941? A. Yes, sir.

Q. And when did you buy from McCandless on Hawaii? [58]

A. McCandless on Hawaii, I'd say either '45 or '46. I bought eighty head from Thompson.

(Testimony of Manuel Costa, Jr.)

Q. You testified on your direct examination that it was '43.

A. Well, it's '45 or '46. I couldn't tell the right date but during the war.

Q. Wait a minute, Mr. Costa. The date is important to me.

A. Well, it was during the war. It was after '41 that I bought eighty head from Mr. Thompson in Kona.

Q. Now, they were just ordinary scrub cattle?

A. Yes, they were.

Q. Right?

A. They were scrub cattle. There were some bulls and steers and cows. They were all mixed.

Q. And you paid eighty dollars a head for them?

A. That's right.

Q. And you had to pick them up at the McCandless ranch, is that right.

A. The trucks picked them up from the McCandless ranch.

Q. You did?

A. I didn't. The trucks, my trucks picked them.

Q. Your trucks?

A. Express man picked them up. [59]

Q. You paid for it?

A. I paid for the trucks,—

Q. Wait a minute—

A. —but there were eighty heads.

Q. —wait a minute. You paid for the trucks to go down to Kawaihae—right?

A. Yes.

(Testimony of Manuel Costa, Jr.)

Q. And you paid the inter-island tariff from Kawaihae to Honolulu?

A. Oh, yes, that's true.

Q. That's eight dollars a head—right?

A. Five dollars seventy-five cents, I think it was at that time.

Q. Inter-island tariff?

A. I think it was five dollars seventy-five cents for beef cattle. Eight dollars a head was for dairy stock. Beef cattle is a different rate.

Q. All right. How much did it cost you to get those, to use the trucks to get the cattle from the McCandless ranch to Kawaihae?

A. If I don't make a mistake, I paid \$125 for the truck. They have to load them on the trucks, though.

Q. Wait a minute. After you got the cattle down here in Honolulu, you took delivery of them?

A. At the wharf. [60]

Q. At the wharf? Came down by the "Humu-ulu"—right? A. Yes.

Q. So those cattle that you purchased from McCandless cost you landed in Honolulu something around ninety dollars a head—right?

A. Yes, around.

Q. Now, why was it Allen Davis was selling you cattle, pure bred, at sixty dollars a head?

A. Because I bought the whole herd. I took the whole thing he had.

Q. Oh, he wanted to get out of the business, is that it?

(Testimony of Manuel Costa, Jr.)

A. Well, whether he wanted to get out of the business or not, I took the whole herd. I took the ranch over.

Q. He wanted to get finished with it?

A. Well, if he wants it or not, but I bought the whole herd, I bought the ranch over.

Q. Did he go out of the ranching business at that time?

A. And I still have the leased land.

Q. Mr. Costa, will you listen, please? Did Mr. Davis go out of the ranching business at that time?

A. Yes.

Q. What do you think those cattle were worth that you bought from Davis? [61]

A. Well, what I think it was worth—just what I paid for them at that time.

Q. You wouldn't have sold them for that?

A. No, I kept them. And I got rid, I sold them around, during the war, selling ten, fifteen at a time.

Q. How much did you get a head for them?

A. Got a better price for them.

Q. How much?

A. I don't remember how much right now.

Mr. Deuel: Just a minute. I object to that question, your Honor. That is bringing them up piecemeal, and it has no relevancy in regard to what the over-all herd is worth.

Mr. Anthony: No further questions.

Mr. Deuel: That's all, Mr. Costa.

(Witness excused.)

Mr. Deuel: Your Honor, that concludes the government's evidence also. At this point, before we go on to the final arguments, however, if your Honor is ready to receive it, I wish to renew my motion to dismiss the matter set forth in paragraph 3 of the petitioner's complaint.

The Court: What is that about?

Mr. Deuel: On the same grounds that I had moved for the dismissal at the conclusion of the Plaintiffs' case, your Honor. And for the record I would like to repeat those. I don't intend to go into the lengthy argument again. We [62] argued that at length before. But I would like it for the record. And I move that, to dismiss this paragraph 3 on the grounds that the facts, that on the facts and the law the Plaintiff has shown no right to relief, and more specifically on the following grounds: 1. That private law No. 433, 80th Congress, under which the action is brought, does not encompass a suit for, or recovery for use and occupancy. 2. There is no cause of action stated in paragraph 3 as against the Defendant, the United States of America. 3. General leases No. 1740 and 1741 mentioned in said paragraph 3 were in fact validly cancelled by action of the Commissioner of Public Lands for the Territory of Hawaii. 4. No compensable interest exists in favor of the Plaintiff as against the United States for the use and occupancy of the land covered by general leases No. 1740 and 1741. And, 5, the Plaintiff in fact acquiesced in the cancelling of the general leases Nos. 1740 and 1741.

And with the Court's permission I would like to file this motion and make it part of the record. (Handing a document to the Clerk.)

The Court: The motion hadn't been filed heretofore?

Mr. Deuel: It was an oral motion.

Mr. Anthony: It was argued at great length and overruled. It is the same argument we had at the close of the Plaintiff's case. [63]

Mr. Deuel: There was an oral motion before your Honor, and we argued it for probably two to three hours before. We did go into considerable argument on it. As I say, I do not propose to reargue the points at this time, but I do want to renew the motion at the conclusion of all the evidence.

The Court: You object to that in toto?

Mr. Anthony: Yes, your Honor.

The Court: Well, now, when do you want to argue this case as it stands before the Court?

Mr. Deuel: At your Honor's convenience.

Mr. Anthony: Is the afternoon agreeable to the Court?

The Court: This afternoon? All right.

Mr. Anthony: Two o'clock?

The Court: Two o'clock.

Mr. Deuel: That is agreeable to me.

The Court: Do you think you can get through with it this afternoon?

Mr. Anthony: Oh, yes, I should hope so.

Mr. Deuel: I don't know exactly how long I will

take, but I think probably around a half hour, your Honor.

The Court: All right.

Mr. Deuel: And may we have a ruling on that motion to dismiss that paragraph 3, your Honor? That motion was denied when originally made, but now we have it for reconsideration [64] at the conclusion of all the evidence.

The Court: Did you add any new material to it?

Mr. Deuel: No, it is the same motion and the same grounds.

The Court: Yes. All right. Just before we go, if you gentlemen are doubtful about finishing your argument between two and four, why, I can come at half past one.

Mr. Anthony: Well, I don't see that there is any doubt, any question about being able to finish it. I certainly am not going to take very long.

(The Court recessed at 11:30 a.m.)

Afternoon Session

(The Court reconvened at 2:00 p.m.)

Mr. Anthony: May I proceed, your Honor, for the Plaintiff in this case?

The Court: Yes.

(Mr. Anthony presented his argument on behalf of the Plaintiffs.)

(Mr. Deuel presented his argument on behalf of the Defendant.)

The Court: I don't like to guess in a matter of

this kind, but it is necessary to do some estimating, and in listening to the evidence on both sides the best determination [65] that I can make is that there were 302 head of cattle that were not recovered. Now, of those, from the testimony I think it is fair to assume that 5 per cent were unmarketable, that is, in the beef market, on account of tuberculosis. That would be 15 off that, leaving 287 head of cattle that should be paid for. And I estimate that, from the evidence, a fair value of those cattle running at large there is \$45 a head. My figures, if they are correct, make that \$15,915.

Now, there was spent in recapturing \$4,115. Roughly that would be about \$5 a head, somewhere in the neighborhood of that. Let's say \$5 a head, because it is just impossible to determine. Well, it would have cost something to have caught them if the Army hadn't come in. And from what I have heard of the method of getting many of them out—and many of them were wild, according to the evidence—having to rope them and put three lariats on them and leaving them overnight tied to a tree and then taking them out with oxen power, I assume that that would have cost at least \$2 a head, and \$5 a head spent on the rest. What did you say was the exact number of cattle that you recovered—773?

Mr. Anthony: 793.

The Court: Well, the excess cost over normal cost of recovering those would amount to, as I figure it, \$2,279. The cost of cattle—that would affect the

cost of cattle at \$15,915, plus \$2,279, those two figures being the loss on [66] cattle.

Now, as to the hogs. Assuming that there were 200 hogs, hogs ranging over the land, it appears that they had the opportunity and didn't take out the sows which were more valuable. Taking the figure of 200 that were lost, from the evidence, ranging from Mr. Marks' valuation of \$25 per capita down to other rather expert testimony of \$10, I am allowing \$15 per capita, that is, \$3,000 for hogs.

There were two horses lost during this time by a railroad accident. Of course, there is no direct proof that it was directly due to the fact that the Army soldiers had opened some gates and destroyed some fences which permitted the horses to come on to the right of way. As far as I heard, the only horses that you had on the ranch were those two that got killed. Is that so or not?

Mr. Marks: No, there were more.

The Court: You recovered the others?

Mr. Marks: We recovered the others.

The Court: Well, two of them that were lost. Taking your figures, Mr. Marks, at 125 a piece, \$250.

Mr. Anthony: What's that for the horses?

The Court: \$250 for two horses. Now, the bags, the kiawe beans, the posts, in the aggregate amounted to \$190. There is no evidence to the contrary. We are left, then, with the leasehold. There were 7,000—there were 4,792.72 [67] acres, isn't that so? Allowing \$2 per acre per year, and allowing four and a third years—that's about all I can get out of that, four and a third years—that

the ranch operator was excluded from use in operating the same, that makes a total of my figures, if my figures are correct, of the value lost in the taking away of the right of \$18,769.32.

Mr. Anthony: What was that figure again?

The Court: \$18,769.32.

Mr. Anthony: And that's four and one-third years at \$2 per annum?

The Court: No, wait. I should double that by two. I got here 37,000, \$37,538.64, at \$2 an acre, \$37,538.64. Now, in addition to that, as I get from the evidence, there was property, residence property on the beach there.

Mr. Anthony: There was.

The Court: And I don't know that there has been any testimony given as to that.

Mr. Anthony: There was, at \$125 per month.

The Court: I know, but other than Mr. Marks' estimate.

Mr. Deuel: There was. Mr. Marks testified to \$125 a month, and Mr. Child broke it down and testified as to one hundred dollars.

The Court: I believe that one hundred dollars a month is the best estimate of value.

Mr. Anthony: Your Honor, could I get that? I'm sorry. [68] Could I get that figure?

The Court: On the leasehold?

Mr. Anthony: On the leasehold, yes.

The Court: I figured 4,792.72 acres.

Mr. Anthony: That's correct.

The Court: Well, first I figured it for four and

one-third years' term, and I arrived at the figure of \$18,769.32. Then at \$2 per acre it doubled that.

Mr. Anthony: Wait, then there's a third of that.

The Court: Four and a third years.

Mr. Anthony: Was that the 18,000?

The Court: No, that gave me \$18,769.32; that's four and one-third times 4,792, and it gave me \$18,769.32, if my addition is correct.

Mr. Anthony: 21,400 as I get it.

The Court: Well, we will go over that again. I don't see how you can make it that. Yes, I made a mistake.

Mr. Anthony: I get 21,432—20,432.

The Court: \$21,538.64, is that right?

The Clerk: I got \$20,769.32.

Mr. Anthony: I got 20,432. That's multiplied by two.

The Court: Well, here are the figures, here are the base figures: four and a third times 4,792.92, the result of that doubled by two. That is the product of four and a third times the number of acres. [69]

Mr. Anthony: I get a figure of 20,765.

The Clerk: 27,769, that's what I get.

Mr. Anthony: I didn't bother with the fractions.

The Court: Didn't bother with what?

Mr. Anthony: I didn't bother with the point 92.

The Court: I did. The correct figure is \$21,538.64.

Mr. Anthony: That is multiplied by two.

The Clerk: The total is \$21,538.64.

The Court: \$21,538.64. Now, 60 months times a hundred dollars a month for the house is six thou-

sand. I am not punishing the McCandless ranch—at least, I have no intention of it—by reason of any depreciation of value that did result, existing on the 8th day of December at the time the entry was made. Now, with the war on, that house could not have been rented for anything if the Army hadn't gone in, couldn't have been rented for more, and the very fact of the war did depreciate it. We all know that. It is a matter of common knowledge that the Court must take notice of. But I think that is a fair and reasonable amount to allow for the house during the remainder of this term, \$6,000.

Now, the figures that I've got, if we sum them up are, \$69,172.64.

The Clerk: That is right, your Honor.

Mr. Deuel: What was that total? [70]

The Clerk: \$69,172.64.

Mr. Deuel: \$69,172.64, that is the total of everything?

The Court: Total of everything.

Mr. Deuel: I didn't get your first total on the 287 head of cattle.

The Court: I didn't take 287. I took——

Mr. Anthony: You took 302 and you subtracted——

The Court: I took 302 and subtracted five per cent.

Mr. Deuel: That made 287 head.

The Court: And then I multiplied that sum by 45, which gave me \$15,915.

Mr. Deuel: I had a total on that from my

multiplication—I am probably wrong—but it is \$12,915. It might be worth recomputing.

The Court: Let's go over that again.

Mr. Anthony: \$12,915.

The Court: I did make a mistake there. I did make a mistake. It is \$11,915.

The Clerk: No, twelve thousand.

The Court: I should say \$12,915. That would be the first figure instead of 15. And to that is added \$2,279. Well, that simply takes three thousand off. The total addition, then, is \$66,172.64. I find for the Plaintiff in that sum.

Mr. Anthony: Shall I prepare and submit to your Honor [71] findings of fact and conclusions in conformity with the rules?

The Court: Yes.

(The Court adjourned at 4:15 p.m.)

Certificate

I, Albert Grain, Official Court Reporter, do hereby certify that the foregoing is a true and correct transcript of proceedings in Civil 886, A. Lester Marks, et al., vs. United States of America, held in the United States District Court, Honolulu, T. H., on April 3, 1950, before the Hon. Delbert E. Metzger, Judge.

June 20, 1950.

/s/ ALBERT GRAIN. [72]

April 19, 1950

The Clerk: Civil No. 886, A. Lester Marks, and others, Plaintiff, vs. United States of America. For entry of judgment and findings of fact and conclusions of law.

Mr. Deuel: If the Court please, I have one very brief matter before we take that up. Your Honor will recall that the Government made a motion to strike Paragraph 3 of the plaintiff's Complaint, both at the conclusion of the plaintiff's case and again at the conclusion of all of the evidence, which motion was overruled. The Court allowed the plaintiff to amend the Complaint, and that was done, subsequent to the Court's decision, and I have not had a chance before now to clarify the matter. I merely wish the record to show that the Government's motion to strike runs also as against the Complaint as amended. That is all I had in that regard, but I want to be sure that it so runs.

The Court: All right.

Mr. Anthony: We have no objection to that, your Honor.

As to the findings of fact and conclusions of law and judgment, the Court will recall in the course of the Court's oral decision that he made certain mathematical computations based upon areas. A check by Counsel for the Government and myself has revealed several minor mathematical errors.

The Court: Yes.

Mr. Anthony: Which have been corrected in the findings of fact and conclusions of law and the

judgment, which I have handed to the Clerk for entry. The findings of fact and conclusions of law and the judgment, as handed to the Clerk for entry this morning, have the approval of the Government, except, of course, subject to the motions which they have made.

The Court: Yes, very well. The Clerk points out that there is a typographical error on the last page of the findings and conclusions in the sum set out there.

Mr. Anthony: The Clerk will change that on the typewriter, your Honor. The judgment figure is correct.

The Court: All right.

(Thereupon, at 9:05 a.m. the hearing in the above-entitled matter was adjourned.) [74]

Certificate

I, Lucille Hallam, Official Reporter, United States District Court, District of Hawaii, Honolulu, T. H., do hereby certify that the foregoing is a true and correct transcript of my shorthand notes taken in Civil No. 886, A. Lester Marks, etc., Plaintiffs, vs. United States of America, Defendant, held April 19, 1950, before Hon. Delbert E. Metzger, Judge.

June 29, 1950.

/s/ LUCILLE HALLAM.

[Endorsed]: Filed June 30, 1950.

[Title of District Court and Cause.]

**CERTIFICATE OF CLERK, U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD ON
APPEAL**

United States of America,
District of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing record on appeal in the above-entitled cause, consists of the following original pleadings, transcript of proceedings, and exhibits of record in said cause:

Complaint, Exhibit A, and Summons.

Answer.

First Amended Answer.

Motion to Dismiss.

Amended Complaint.

Findings of Fact and Conclusions of Law.

Judgment.

Amended Judgment.

Notice of Appeal.

Order Extending Time to Docket Record on Appeal.

Designation of the Contents of the Record on Appeal.

Amended Designation of the Contents of the Record on Appeal.

Transcript of Proceedings—February 14, 15, 16, and 17, April 3 and 19, 1950.

Joint Exhibits "A," "B-1," "B-2," "B-3,"
"C-1," "C-2," and "C-3,"

Plaintiffs' Exhibits "A," "B," "C," "D," "E,"
and "F."

United States Exhibits Nos. 1, 2, 3, 4, 5-A, 5-B,
and 5-C.

In Witness Whereof, I have hereunto set my
hand and affixed the seal of said District Court, this
8th day of September, 1950.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, United States District Court, District of
Hawaii.

[Endorsed]: No. 12,680. United States Court of
Appeals for the Ninth Circuit. United States of
America, Appellant, vs. A. Lester Marks, Elizabeth
Loy Marks, and Herbert M. Richards, Trustees of
the Estate of L. L. McCandless, Deceased, Appellees.
Transcript of Record. Appeal from the United
States District Court for the Territory of Hawaii.

Filed September 13, 1950.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 12680

UNITED STATES OF AMERICA,

Appellant.

vs.

A. LESTER MARKS, ELIZABETH LOY
MARKS and HERBERT M. RICHARDS,
Trustees of the Estate of L. L. McCandless,
Deceased,

Appellees.

APPELLANT'S STATEMENT OF POINTS

The appellant respectfully submits the following statement of points upon which it intends to rely on appeal:

1. The district court erred in holding that the plaintiffs' claim for loss of personal property did not fall within the prohibition of the jurisdictional act against an award for losses "which arose out of the combat activities of military personnel of the United States."

2. The district court erred in finding substantial evidence to support the award to the plaintiffs for loss of personal property.

3. The district court erred in holding that the withdrawal by the Territory of Hawaii of lands covered by General Leases No. 1740 and No. 1741 for the use of military personnel of the United

States did not constitute a withdrawal for the public purposes of the Territory as provided in the Hawaiian Organic Act and in the leases.

4. The district court erred in holding that withdrawal by the Territory of Hawaii of lands covered by General Leases No. 1740 and No. 1741 for the use of military personnel of the United States did not constitute a withdrawal "for any public purpose" as provided in the leases.

5. The district court erred in holding that the occupancy and possession by the United States of the lands described in General Leases No. 1740 and No. 1741 was without lawful authority.

6. The district court erred in holding that the plaintiffs did not acquiesce in the cancellation of General Leases No. 1740 and No. 1741.

7. The district court erred in holding that the plaintiffs are entitled to compensation for the withdrawal of General Leases No. 1740 and No. 1741.

8. The district court erred in denying the motion of the United States to dismiss the complaint insofar as it seeks damages for cancellation of the leases.

9. The district court erred in holding that the complaint states a cause of action against the United States.

10. The district court erred in denying the claim of the United States for a set-off to the extent of the value of buildings and other facilities which it

constructed on lands of the plaintiffs as an aid in terminating their ranching operations.

11. The district court erred in awarding the plaintiffs against the United States the sum of \$18,434.00 for loss of personal property and \$47,-460.29 for loss of the leaseholds together with interest on those amounts.

/s/ A. DEVITT VANECH,
Assistant Attorney General.

/s/ ROGER P. MARQUIS,
Attorney, Department of
Justice, Washington, D. C.

[Endorsed]: Filed September 22, 1950.

[Title of Court of Appeals and Cause.]

DESIGNATION OF THE RECORD
TO BE PRINTED

The United States of America, appellant, hereby designates for printing the complete record and all the proceedings and evidence in the action, including this designation and appellant's statement of points.

/s/ A. DEVITT VANECH,
Assistant Attorney General.

/s/ ROGER P. MARQUIS,
Attorney, Department of
Justice, Washington, D. C.

[Endorsed]: Filed September 22, 1950.

No. 12,680

IN THE
United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

A. LESTER MARKS, ELIZABETH LOY
MARKS, and HERBERT M. RICHARDS,
Trustees of the Estate of L. L. McCandless, Deceased,
Appellees.

Upon Appeal from the United States District Court
for the Territory of Hawaii.

BRIEF FOR THE UNITED STATES, APPELLANT.

A. DEVITT VANECH,
Assistant Attorney General,

FRED K. DEUEL,
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Honolulu, T. H.,

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FILED

JAN 15 1951

PAUL F. O'BRIEN,
CLERK

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No. 12,680

IN THE
United States Court of Appeals
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UNITED STATES OF AMERICA,
Appellant,

vs.

A. LESTER MARKS, ELIZABETH LOY
MARKS, and HERBERT M. RICHARDS,
Trustees of the Estate of L. L. Mc-
Candless, Deceased,
Appellees.

Upon Appeal from the United States District Court
for the Territory of Hawaii.

BRIEF FOR THE UNITED STATES, APPELLANT.

OPINION BELOW.

The District Court did not write an opinion.

JURISDICTION.

The jurisdiction of the District Court was invoked under Section 1 of an Act approved June 29, 1948, which is set forth in the statement at pp. 2-3, *supra*. The District Court's judgment was entered April 19, 1950 (R. 18-19). An amended judgment was entered

April 25, 1950 (R. 19-20). Notice of appeal was filed June 16, 1950 (R. 20). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1291.

QUESTIONS PRESENTED.

1. Whether damages to and loss of personal property resulting from preparations for the defense of Hawaii on and immediately after December 7, 1941, "arose out of the combat activities of military personnel of the United States."

2. Whether lands ceded to the United States by the Republic of Hawaii under the joint resolution of annexation and in the custody of the Territory pursuant to Section 91 of the Organic Act may be withdrawn for the use of the United States Army without liability to those holding leases from the territory.

3. Whether the United States could set-off the value of improvements made by it for the benefit and at the request of the lessees against damages which might be awarded for termination of the leases.

STATEMENT.

Section 1 of an Act approved June 29, 1948 (R. 4-5) provides:

That jurisdiction is hereby conferred upon the District Court of the United States for the Territory of Hawaii to hear, determine, and render judgment upon the claims of the executors and trustees of the estate of L. L. McCandless [plain-

tiffs below and appellees here], deceased, as their interests may appear, against the United States of America for damages, if any, but not exceeding the sum of \$46,155, for the loss of personal property including the loss of livestock, alleged to have been caused by military personnel of the United States, and for damages, if any, but not exceeding the sum of \$67,500 for the alleged illegal withdrawal of the Government lands covered by General Leases Numbers 1740 and 1741 of the Territory of Hawaii, each dated December 29, 1925, from the operation of those leases for use by the United States Army for war purposes: Provided, That judgment shall not be rendered against the United States with respect to any part of the alleged damages for the loss of personal property, including livestock, which arose out of the combat activities of military personnel of the United States.

Section 2 provides:

Proceedings for a determination of these claims shall be had in the same manner as in cases against the United States of which the district courts of the United States have jurisdiction under the provisions of section 24 of the Judicial Code as amended [now 28 U.S.C. section 1346].

By virtue of that Act this suit was commenced December 29, 1948 (R. 5). The amended complaint (R. 12-13) alleged, first, that plaintiffs had sustained a loss of \$46,155 because on December 7, 1941 "and immediately subsequently" Army personnel took possession of their Oahu ranch and, by reason of the destruction of fences, paddocks and corrals, caused

the livestock to scatter over the countryside (R. 12) and, second, that plaintiffs had sustained a further loss of \$67,500 because Lease No. 1740, which ran until December 29, 1946, was wrongfully cancelled as of June 29, 1942, and Lease No. 1741, which had the same expiration date, was wrongfully cancelled as of December 29, 1942 (R. 12-13). The answer of the United States (R. 8-10) denied liability and asserted that, against any damages awarded for cancellation of the leases, there should be set-off the sum of \$23,868.52 it had spent in construction work on other lands owned by plaintiffs in connection with their removal from the leased lands. As required by Section 2 of the jurisdictional Act, there was a trial before the district judge.

1. The testimony in respect of the damages to livestock may be summarized as follows:

On December 7, 1941, the leased areas—4783.88 acres¹—together with some land owned by the estate, was used as a ranch. The leased land was improved by a dwelling house and a small guest cottage. There were also fences and water troughs (R. 43). The livestock consisted of an estimated 1200 cattle (R. 46), 200 pigs (R. 53) and two horses (R. 52). Immediately after December 7, 1941, 15 soldiers, two non-commissioned officers, and a second lieutenant entered the property (R. 127, 275). They strung barbed wire on the beach and erected gun emplacements (R. 128, 275). On December 14, another detachment went in

¹Originally, the leases covered 4792.72 acres (R. 3) but 8.84 acres were withdrawn in 1929 by executive order (R. 102).

for the purpose of patrolling the area back of the beach (R. 274). It comprised about 75 men, some of whom were attached to the mule train which brought in supplies (R. 277).

About December 17, Mr. Marks, one of the appellees and their only important witness on the issues now material, got up to the ranch for the first time since the attack. He testified: "The troops were occupying most of the available houses. They were busy putting up barbed wire entanglements. They had torn down fences and were using any available material that could be used in the creation of their defensive positions [R. 47]. * * * there was an [expectancy] of an attack down there, and they were taking all material that they could get hold of, and every precaution that they could to be prepared for it" (R. 48-49).² However, as a result: "The fences were down. The wires had been cut. The pipe lines taking water to the troughs had been cut. In two instances * * * the troughs had been turned over, and in another instance where there was a permanent concrete watering trough a machine gun had been used to shoot the corner off of it. They seemed to think that mosquitoes were breeding in it." (R. 48). And, Mr. Marks added,

²Colonel Kendell J. Fielder, at the time in charge of military intelligence in the Islands (R. 139) testified that after December 7, 1941, the Army "thought it was possible that raids might be attempted by the Japanese to say the least. An all-out invasion to capture the islands seemed not too probable, but possible. After all, the military didn't think that the Japs would attack the place in the first place, so they felt there was always a threat of an attempted invasion [R. 140]. * * * There was definitely anticipation of raids, agents being landed from submarines, air tights and the like" (R. 141).

the cattle "just were dispersed" (R. 49); 200 pigs "just disappeared" (R. 53) and two saddle horses went through a cut fence onto a railway track and were killed (R. 52; see also R. 128).

Mr. Marks further testified that the Army had in the ranch area "trucks and tanks and all manner of motor vehicles" (R. 51) "gun emplacements and pill boxes and anti-aircraft locations" and troops "deployed over the entire area" (R. 52). This testimony indicates the presence of many men and much activity. But the witness does not fix the time when these conditions existed and it is plain they could not have existed very soon after the attack on Pearl Harbor. Then there were no vehicles "because [in the words of the sergeant in charge of the patrol] you cannot get in that area with vehicles. Later on the Army engineers built a road * * * (R. 279)." By the spring of 1943, the patrol had set up two observation posts, six machine gun positions and two mortar positions (R. 274). It was almost six months before the detachment on the beach amounted to a full company (R. 127). The 75-man patrol did not increase in strength. Additional soldiers were not moved in until training operations began in the area (R. 278) late in 1942 (R. 277).

2. There is no dispute as to the facts relevant to the cancellation of the leases. They are in documents:

Lease 1740, from the Territory to James F. Woods, appellee's assignor, was dated December 29, 1925, and was for a term of 21 years. It contained the following provisions (R. 35-36):

“It Is Mutually Agreed, That at any time or times during the term of this lease, *the land demised*, or any part or parts thereof, *may at the option of the Lessor*, on behalf of the Territory of Hawaii, or any person or persons, corporation or corporations, *be withdrawn from the operation of this lease* for homestead or settlement purposes, or for storing, conserving, transporting and conveying water for any purpose, or for reclamation purposes, or for forestry purposes, or for telephone, telegraph, electric power, railway or roadway purposes, or *for any public purpose*, or for sale for any purpose for which land may be sold under the provisions of Section 73 of the Hawaiian Organic Act as now or hereafter amended, and possession resumed by the Lessor, *in which event the land so withdrawn shall cease to be subject to the terms, covenants and conditions of this lease*, and the rent hereinabove reserved shall be reduced in proportion to the value of the part so withdrawn.” [Emphasis supplied.]

Under date of July 2, 1942, the Territory's Commissioner of Public Lands wrote appellees as follows (R. 34):

Please be informed that request has been made by Lieutenant General Delos C. Emmons, by letter dated June 17, 1942, to Governor J. B. Poin-dexter, that all of the government land of Kahanahaiki and Makua in Makua Valley, Waianae, Oahu, be made immediately available to the Army for war purposes.

As the greater portion of the land in Makua Valley is covered by General Lease No. 1740 held

by the L. L. McCandless Estate, wherein said lease provision is made for the withdrawal of any or all of the land covered thereby whenever it is required for any public purpose, therefore, pursuant to the request of Lieutenant General Delos C. Emmons, all of the land * * * covered by General Lease No. 1740 is hereby withdrawn from the operation thereof for public purpose to wit: For use by the Army for war purposes.

General Lease No. 1740 is hereby cancelled effective June 29, 1942, the date to which rent under this lease has been paid.

Lease 1741, also from the Territory to appellees' assignor, began and was to have ended at the same times as No. 1740. It contained the same cancellation clause (R. 36). It was cancelled as of December 29, 1942, by a letter dated July 27, 1942, the first two paragraphs of which were the same as those of the letter cancelling Lease 1740 (R. 37.)³

3. The facts in respect of the Government's claim of set-off are as follows:

When the ranch was moved from the leased lands, Mr. Marks requested that the Army construct certain structures on the fee land (R. 102, 107, 184). In consequence, the Army built there certain dwellings and auxiliary facilities (R. 181-182) at an estimated

³The third paragraph stated that December 29, 1942, was fixed as the cancellation date because rent had been paid to that date and there was no provision in law for a refund. It added that the Army, however, required immediate possession and asked appellees to sublease to the Army until the cancellation date (R. 37). Apparently this was done. The Army reimbursed appellees for the rent it had paid for the six months (R. 117).

cost for material and labor of \$16,587.50 (R. 183). Mr. Marks testified that the estimate was "a fair evaluation of what they [the Army] put in" (R. 324). On June 30, 1949, the parties stipulated that just compensation for certain land condemned in 1942 was \$65,000 (R. 24-26, 112). Mr. Marks testified that he had proposed a substantially higher figure than the Government was willing to offer originally and that in arriving at his figure he took into account the improvements made by the Army (R. 322-323). He did not testify—and Government counsel denied (R. 109)—that the amount *agreed upon* was computed on this basis.

The trial Court found:

That on December 7, 1941, military personnel of the defendant entered into possession of plaintiffs' ranch and thereafter occupied the entire premises, disrupting plaintiffs' ranching operations; that upon the initial entry only a small number of troops occupied portions of the ranch premises along the coastline, but subsequently in the year 1942, a substantial number of military personnel was deployed throughout the premises together with their equipment; that the military personnel so entering upon the plaintiffs' premises were not engaged in combat activities. (Fdg. 4, R. 15).

That as a direct result of the activities of the military personnel on the premises, fences, paddocks and corrals were destroyed and caused [sic] livestock of plaintiffs to be dispersed throughout the countryside which resulted in damage to the plaintiffs as follows:

(a) 287 head of cattle lost.....	\$12,915.00
(b) Cost to plaintiffs of recovering stray cattle.....	2,079.00
(c) 200 pigs	3,000.00
(d) 2 horses	250.00
(e) Loss of 500 bags, 400 bags of algaroba beans and 200 red- wood posts	190.00
(f) Value of General Leases 1740 and 1741 for 41½ years	41,460.29
(g) Rental value of house and guest cottage	6,000.00
Total.....	\$65,894.29

(Fdg. 5, R. 15-16.)

That the injuries and damages and loss of personal property and loss of said leaseholds did not arise out of the combat activities of the military personnel of the United States. (Fdg. 6, R. 16.)

That the construction by the United States of certain improvements on land owned in fee simple by the Estate of L. L. McCandless was made without reference to the claim, the subject matter of this action, and is irrelevant to plaintiffs' recovery herein and that defendant has failed to establish said set-off by a preponderance of the evidence and it is therefore denied. (Fdg. 7, R. 16.)

Its material conclusions of law were:

That the occupancy and possession of the lands described in General Leases No. 1740 and 1741

was [sic] without lawful authority and that the action of the Commissioner of Public Lands purporting to withdraw said leases for the use of military personnel did not constitute a withdrawal for public purposes of the Territory of Hawaii as provided in the Hawaiian Organic Act and the leases referred to and that plaintiffs are entitled to just compensation for the taking of said leaseholds. (Concl. 2, R. 17.)

The Court having found that plaintiffs have established the allegations of the amended complaint by a preponderance of the evidence and having further found that defendant failed to establish its set-off that therefore judgment should be entered in favor of plaintiffs and against defendant in the sum of \$65,894.29. (Concl. 3, R. 17-18.)

Judgment was accordingly entered on April 19, 1950 (R. 18-19). It was modified in a particular here immaterial on April 25 (R. 19-20). This appeal followed (R. 20).

SPECIFICATION OF ERRORS.

The statement of the points relied on by the United States on its appeal (R. 397-399) may be summarized as follows:

The District Court erred:

1. In holding that the plaintiffs' claim for loss of personal property did not fall within the prohibition of the jurisdictional act against an award for losses "which arose out of the combat activities of military personnel of the United States."

2. In holding that the occupancy and possession by the United States of the lands described in General Leases No. 1740 and No. 1741 was without lawful authority.

3. In denying the claim of the United States for a set-off to the extent of the value of buildings and other facilities which it constructed on lands of appellees.

4. In awarding appellees the sum of \$18,434.00 for loss of personal property and \$47,460.29 for loss of the leaseholds together with interest on those amounts.

ARGUMENT.

I.

THE DAMAGES TO THE PERSONAL PROPERTY AROSE OUT OF THE COMBAT ACTIVITIES OF MILITARY PERSONNEL OF THE UNITED STATES.

As the statement shows (pp. 9-10, *supra*) the trial Court found "that the military personnel so entering upon the plaintiffs' premises were not engaged in combat activities" (Fdg. 4, R. 15) and "That the injuries and damages and loss of personal property and loss of said leaseholds⁴ did not arise out of the

⁴The language of Findings 4 and 6 indicates that the Court treated the loss of livestock and the loss of leased areas as arising from the same cause. This was erroneous as the loss of livestock resulted from the activities of troops while the loss of leased areas was due to cancellation of the leases. Since the cancellation of leases is clearly not a "combat activity" the failure to treat these losses separately may well have resulted in not giving proper weight to the character of the activities causing the loss of livestock.

combat activities of the military personnel of the United States" (Fdg. 6, R. 16). Although couched in terms of findings, these statements are really conclusions of law. This is evident from the fact that there was no dispute as to the time, physical nature, and purpose of the activities causing the damage. Thus the purported finding involves only the construction of the term "combat activities."

Combat activities are generally understood to be those activities closely connected with hostilities. This Court has construed the phrase "combatant activities" in the Federal Tort Claims Act.⁵ *Johnson v. United States*, 170 F. (2d) 767 (1948). In that case the Court stated at page 770:

" 'Combat' connotes physical violence; 'combatant', its derivative, as used here, connotes pertaining to actual hostilities; the phrase 'combatant activities', of somewhat wider scope, and superimposed on the purpose of the statute, would therefore include not only physical violence, but activities both necessary to and in direct connection with actual hostilities. * * *"

"The rational test would seem to lie in the degree of connectivity. Aiding others to swing the sword of battle is certainly a 'combatant activity', but the act of returning it to a place of safekeeping after all of the fighting is over cannot logically be catalogued as a 'combat activity'."

It is worthy of note that the phrases "combat activities" and "combatant activities" were used inter-

⁵Excepted from the Act is "any claim arising out of the combatant activities of the military or naval forces, or Coast Guard, during time of war" 28 U.S.C.A. sec. 2680(j).

changeably by the Court in the above-quoted discussion and correctly so because when used as adjectives "combat" and "combatant" are synonymous. Webster's New International Dictionary (2d ed. unabridged). The jurisdictional Act here (pp. 2-3, *supra*) was passed within two years after the Federal Tort Claims Act. The exception provisos are linguistically indistinguishable. It follows that they must be given the same legal effect. Under the test of connectivity stated by this Court, the activities disclosed by the record here are clearly "combat activities."

The trial Court found: "That as a direct result of the activities of military personnel on the premises, fences, paddocks and corrals were destroyed and caused livestock of plaintiffs to be dispersed throughout the countryside * * *" (Fdg. 5, R. 15-16, pp. 9-10, *supra*). These activities occurred as stated in the complaint on December 7, 1941 "and immediately subsequently" (R. 12). The evidence is consistent with this allegation of the complaint. Thus, when Marks first arrived on the scene it was in his own words "about ten days" after the bombing of Pearl Harbor (R. 47). As the statement points out (p. 6, *supra*) it is clear that by this time the damage had been done (R. 47-49).

During the ten days following the attack on Pearl Harbor emergency conditions existed in Hawaii. This Court stated in *Ex parte Zimmerman*, 132 F. (2d) 442, 445 (1942), certiorari denied 319 U.S. 744 (1943):

"The courts judicially know that the Islands, in common with the whole Pacific area of the United States, have continued in a state of the gravest emergency; and that the imminent threat of a resumption of the invasion persisted. In the months following the 7th of December the mainland of the Pacific coast was subjected to attacks from the sea. Certain of the Aleutian Islands were invaded and occupied. And as late as the early summer of 1942 formidable air and naval forces of Japan were turned back at Midway from an enterprise which appeared to have Hawaii as its ultimate objective."

The purpose of the activities of the men causing the destruction of fences was directly connected with the attack on December 7, 1941. Witnesses for both parties testified that another attack was anticipated (R. 139-141, 194). The small group of men were engaged in patrolling, stringing barbed wire, and preparing gun emplacements for the purpose of repelling the expected attack (R. 274, 275). These were not training activities because the area was not developed into a training area until late in 1942 (R. 277, 278). Neither were they long range defensive operations. Such operations require heavy equipment and it was not till later that a road was built allowing vehicles to enter the area (R. 279).

Thus the record discloses clearly that the activities of military personnel which caused the damage to personal property occurred on and within ten days after the attack on Pearl Harbor, that the activities were emergency measures to repel an expected re-

newal of the attack, and finally that the area was a combat zone. The trial Court erred in holding they were not "combat activities" within the meaning of the jurisdictional Act.

The Court's attention is invited to a sentence in the report of the committee of the House of Representatives favorably reporting the bill which became the Jurisdictional Act. H. Rept. 2063, 80th Cong., 2d sess. Therein, the committee stated (p. 4) that the provision dealing with "combat activities" seemed "unnecessary as no evidence was presented to your committee of any 'combat activities', as the term is generally understood, of military personnel in the areas in question." This expression is not to be taken as showing or having any tendency to show that the activities which caused the losses involved in this suit were not combat activities.

The report was based on a subcommittee hearing held October 16, 1945, almost four years after the activities in question. Only representatives of appellees appeared. As the report states (p. 3): "There is nothing in the transcript of the testimony taken in Honolulu with regards to this claim to indicate that the Army was present or that it made any effort to present any evidence whatever such as that which the Secretary [of War] states is contained in the Department's files."

It is evident that as a result the subcommittee was not accurately informed as to the facts causing the damages. Thus the report states (p. 2): "On that date, [Dec. 7, 1941] following the bombing of Pearl

Harbor, and in defensive operations against possible Japanese invasion, United States Army contingents, *including artillery, swarmed over the lands* owned in fee simple or under lease by the said McCandless estate.” (Emphasis supplied.) This clearly implies large numbers. But the record shows and the Court found that only a small number of troops were in the area at the time the activities occurred which caused the loss of livestock (R. 277-278, Fdg. 4, R. 15). There was no testimony of any artillery brought into the area immediately after December 7, 1941. When the first men arrived they didn’t have so much as a machine gun. The guns did not arrive for two months (R. 132). The report further states that “the United States Army did engage in defensive operations, moving in artillery and military personnel, *setting up camps, roads, etc.*” (Emphasis supplied.) The facts brought out at the trial were that the area was not developed into a training area till late 1942 (R. 277, 288) and it was not until later that a road was built so that small three-ton vehicles could get into the area (R. 279). It is thus clear that the activities brought to the attention of the committee occurred from two to six months after those which caused the loss of livestock for which this suit was brought and that the report did not purport to characterize these earlier acts.

II.

THE LEASES WERE LAWFULLY CANCELLED.

The trial court held that appellees were entitled to compensation for the lands covered by the two leases on the ground that withdrawal of the land for the use of the Army "did not constitute a withdrawal for public purposes of the Territory of Hawaii as provided in the Hawaiian Organic Act" and hence that the consequent possession of the lands by the United States was illegal (R. 17, p. 11, *supra*). Pursuant to this holding, it assessed against the United States \$47,460.29 damages (Fdg. 5(f)(g), R. 16, p. 11, *supra*). Its error is manifest.

A. The withdrawal was authorized by the Organic Act.

Section 91 of the Organic Act, approved April 30, 1900, 31 Stat. 159, 48 U.S.C. sec. 511, provides:

Except as otherwise provided, the public property ceded and transferred to the United States by the Republic of Hawaii, under the joint resolution of annexation * * * shall remain in the possession, use, and control of the government of the Territory of Hawaii, and shall be maintained, managed and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or of the governor of Hawaii.

Admittedly, the land covered by the two leases was ceded to the United States by the Republic of Hawaii, i.e., the United States had title thereto. But by virtue

of section 91 the land was to remain in the possession and control of the Territory "until * * * taken for the uses and purposes of the United States by direction of the President or of the governor of Hawaii." It *was* taken for the use of the Army for war purposes. Obviously, therefore, the consequent possession by the United States was lawful and appellees were not entitled to be compensated for the cancellation of the leases.

As section 91 makes plain, the Territory possessed the lands at the will of the United States. The Territory could not of course grant the appellees any more than it had. In what must be deemed needless affirmation of this rudiment, it inserted in each lease the provision that "the land demised * * * may at the option of the Lessor * * * be withdrawn from the operation of this lease * * * for any public purpose * * *" (R. 35, p. 7, *supra*). By this language the Territory protected itself in the event that, as here, the United States asserted its rights.

Apparently the erroneous holding was induced by appellees' contention below that at the time the leases were made the Organic Act allowed the Territory to withdraw lands for local purposes but not for the use of the national government (see R. 30-31). The argument in support of this contention ignores section 91 and rests on the fact that prior to the Act of August 21, 1941, 55 Stat. 658, another section of the Organic Act, section 73(q), 48 U.S.C. sec. 677, provided that: "All orders setting aside lands for forests or other

public purposes, or withdrawing the same, shall be made by the Governor, and the lands while so set aside for such purposes may be managed as may be provided by the laws of the Territory," and that the 1941 Act added to the foregoing sentence the following words: "the provisions of this section may also be applied where the 'public purposes' are the uses and purposes of the United States, and lands while so set aside may be managed as may be provided by the laws of the United States." Appellees' conclusion was that the amendment shows that until its enactment leased public lands could be withdrawn only for local purposes.

There is no basis for this conclusion. Putting aside the consideration that such a construction of unamended section 73(q) would by mere implication qualify and contradict the unequivocal terms of section 91, it is manifest that the 1941 amendment lacks the significance attributed to it by appellees. Rather, contrary to their contention, the passage of the amendment confirms—if that were necessary—the meaning of section 91. These things are shown by the committee reports recommending the amendment. H. Rep. No. 831, S. Rep. No. 576, 77th Cong., 1st sess. The House Report says—and the Senate Report repeats—the following: "The purpose of the bill is to correct a technical defect in the Hawaiian Organic Act in order to give the Governor of Hawaii the same authority over public lands acquired since annexation that the Organic Act grants him over the public domain comprised in the Territory at that

time." And each report quotes a letter from the Secretary of the Interior to the Chairman of the House Committee on the Territories, in which it is said: "The purpose of this bill is to amend section 73, subsection (q) of the Hawaiian Organic Act for the purpose of authorizing the Governor of Hawaii to set aside for the uses and purposes of the United States any lands acquired by the Territory since the annexation, and in addition to those ceded by the Republic." Two things are thus apparent. The first is that the 1941 amendment pertained only to land which, unlike that here involved, was acquired since annexation. The second is that Congress was quite aware that land which, like that here involved, was ceded at the time of annexation could before passage of the amendment be withdrawn for national purposes.

B. In any event—wholly apart from Section 91—the leases themselves provided for cancellation if the lands were needed by the United States.

As the statement shows (p. 7, *supra*), the Commissioner of Public Lands and the lessees agreed that "the land demised * * * may at the option of the lessor * * * be withdrawn from the operation of this lease * * * for any public purpose."⁶ The land was withdrawn "for public purpose, to wit: For use by the Army for war purposes" and the lease was cancelled (*supra*, p. 8). The Court below, concluded, however, that plaintiffs were entitled to just compensation for the taking of the leaseholds because the action "did

⁶The withdrawal power under the lease is not to be confused with the withdrawal powers of the Governor under the Organic Act.

not constitute a withdrawal for public purposes of the Territory of Hawaii as provided in the Hawaiian Organic Act and the leases referred to." This conclusion was, we submit, plainly erroneous for two reasons.

First, the conclusion of the Court below rests on the view that the lease provision permitted withdrawal only for purposes of the Territory of Hawaii rather than for use by the United States. The provision was not so limited. Instead, withdrawal was authorized for numerous purposes particularly specified "or for any public purpose." Broader language can hardly be imagined. There is no basis for ignoring this plain language by inserting after "public purpose" the restriction "of the Territory of Hawaii." Particularly, when the fee title to these lands is in the United States and the Territory is a political subdivision of the United States (*Cincinnati Soap Company v. United States*, 301 U.S. 308, 317 (1937)) a distinction between public purposes of the United States and of the Territory is not justified. In this regard the present lease is indistinguishable from private leases providing for termination if the property is taken or condemned "for any public use" or by "any competent authority" which apply when the Federal Government condemns as well as to proceedings brought by local authorities. *United States v. Honolulu Plantation Co.*, 182 F. (2d) 172 (C.A. 9, 1950), certiorari denied 340 U.S. 820 (1950); *United States v. 21,815 Square Feet of Land*, 155 F. (2d) 898 (C.A. 2, 1946).

The interest of the Territory in aiding the public purposes that may be promoted by the United States is apparent from the fact that section 91 of the Organic Act (*supra*, p. 18) embraces withdrawals for public purposes of the United States both by the President and by the Governor.

Secondly, even if the words "of the Territory" were inserted after the words "public purpose" the result would be the same. The land was withdrawn for use by the Army for war purposes. The vital interest of the Territory in successful prosecution of the war and especially in repulsion of the aggressors needs no elaboration. It is difficult to imagine a use of the land which would constitute a more important public benefit to the Territory and its inhabitants. Compare section 67 of the Organic Act approved April 30, 1900, 31 Stat. 159, 48 U.S.C. sec. 532, empowering the Governor to call upon the military and naval forces of the United States to repel invasion. Plainly, the public purposes of the Territory, as well as those of the United States, were served by use of this land to aid in the defense of the Territory. The cancellation of the lease was, therefore, authorized by its express terms.

It is submitted, therefore, that the trial Court erred in holding that the United States unlawfully occupied the leased land and that its judgment of \$47,460.29 because of that occupation should be reversed.

III.

**THE TRIAL COURT ERRED IN DENYING THE
GOVERNMENT'S CLAIM FOR SET-OFF.**

The trial Court denied the set-off claimed by the United States on the grounds that the construction work was done "without reference to the claim, the subject matter of the action, and is irrelevant to plaintiffs' recovery herein and that defendant has failed to establish said set-off by a preponderance of the evidence" (Fdg. 7, R. 16).

In so far as this denial is based on the view that a set-off claim must be relevant to the cause of action it is erroneous as a matter of law. Section 2 of the jurisdictional Act directs that the proceedings "shall be had in the same manner as in cases against the United States of which the district courts * * * have jurisdiction under * * * section 24 of the Judicial Code as amended" (p. 3, *supra*). Section 24 has been superseded by 28 U.S.C. section 1346, subsection (c) of which provides that: "The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand *whatever* on the part of the United States against any plaintiff commencing an action under this section." (Emphasis supplied.) Speaking of the similar, legally indistinguishable, provision of the statute conferring jurisdiction on the Court of Claims, the Supreme Court said: "We have no doubt but that the set-off and counterclaim jurisdiction of the Court of Claims was intended to permit the Government to have adjudi-

cated in one suit all controversies between it and those granted permission to sue it * * *." *Cherry Cotton Mills v. United States*, 327 U.S. 536, 539 (1946).

Furthermore, the rejected set-off is sanctioned by the Federal Rules of Civil Procedure. Rule 13(b), 308 U.S. 680. As the Court said in *In re Monongahela Rye Liquors*, 141 F. (2d) 864, 869 (C. A. 3, 1934): "A distinguishing feature of set-off is that it arises out of a transaction extrinsic to that out of which the primary claim arises. * * * In short a set-off rests upon a claim or demand based upon an independent cause of action. The independent nature of set-off is plainly recognized by the Federal Rules of Civil Procedure." It is therefore clear that the trial Court erred in denying the set-off on the ground it was irrelevant to the subject matter of the action.

The trial judge's further holding in the same finding that the United States had failed to establish the set-off "by a preponderance of the evidence" implies that the set-off was disputed and that the trial judge found that appellees' testimony outweighed that of the United States. But, as the Statement shows (pp. 8-9, *supra*) the United States proved—and appellees admitted—that the United States had spent \$16,587.50 for appellees at their request. If appellees reimbursed the United States, they had the burden of proving the reimbursement. *Converse v. United States*, 69 C. Cls. 670, 677 (1930). They made no attempt to do so. Mr. Marks did testify that before entering the negotiations which resulted in the settlement of Civil No. 485 he

hit upon a figure which to his mind took into account the Government improvements. But he did not testify that the compromise figure reflected these improvements. And the Government denied that it did. It is therefore plain that the set-off was established beyond dispute.

CONCLUSION.

For the foregoing reasons, it is submitted that the judgment appealed from should be reversed.

Dated, January 12, 1951.

Respectfully,

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No. 12,680

IN THE

**United States Court of Appeals
For the Ninth Circuit**

UNITED STATES OF AMERICA,
Appellant,

vs.

A. LESTER MARKS, ELIZABETH LOY
MARKS and HERBERT M. RICHARDS,
Trustees of the Estate of L. L. Mc-
Candless, Deceased,
Appellees.

**Upon Appeal from the United States District Court
for the Territory of Hawaii.**

**BRIEF ON BEHALF OF TRUSTEES
ESTATE OF L. L. McCANDLESS, APPELLEES.**

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FILED

JAN 26 1951

PAUL R. O'BRIEN



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**BRIEF ON BEHALF OF TRUSTEES
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JURISDICTION.

The jurisdiction of the District Court was based on Private Law 433, 80th Congress, 2d Session, approved June 29, 1948.¹ Final judgment was entered April 25, 1950 (R. 19-20) and notice of appeal was filed on June 16, 1950 (R. 20). Jurisdiction of this Court rests on 28 U.S.C. 1291.

¹Record pp. 4, 5 and Appendix.

QUESTIONS PRESENTED.

(1) Did the District Court err in finding that the damage to appellees' personal property did not arise out of "combat activities of the military personnel of the United States"?

(2) Did the District Court err in ruling that the lands leased to appellees by the Territory could not be withdrawn under the terms of the lease for purposes of the United States?

(3) Did the District Court err in finding that appellant failed to establish its counterclaim by a preponderance of the evidence?

STATEMENT.

Prior to December 7, 1949, appellees operated a cattle ranch in the District of Waianae, Island of Oahu, Territory of Hawaii, consisting of certain fee lands and of General Leases No. 1740 and No. 1741 (R. 41-44). On December 9, 1941, the Army began moving into the ranch (R. 127) and ten days later when appellee Marks made his first visit to the ranch after the Pearl Harbor attack, the Army had torn down the fences, cut the pipe lines and overturned or destroyed the water troughs (R. 47-48). The result was that the cattle, unable to get water, dispersed into the forest reserve and many were lost. Some of the dispersed cattle were recovered, however, at a cost estimated at \$4,115.00 (R. 77). Also dispersed or destroyed were some 200 pigs (R. 53). Two

horses, valued at \$125 apiece (R. 52) got out through an open gate onto the railroad and were killed by a train (R. 128).

On December 29, 1941, appellee Marks wrote the "Military Governor" pointing to the fence cutting and stating that the result was a dispersal of the cattle (R. 56). The military authorities replied and issued an order that where fences were cut temporary barriers be erected (R. 57, 58). The soldiers also used 200 redwood fence posts as firewood and took 400 bags of algaroba beans and 500 empty jute bags (R. 78-79). There was testimony as to the number of cattle and pigs lost, their marketability and their value. However, appellant does not challenge the court's findings on damages.

General Leases No. 1740 and No. 1741, each contained the following provisions:

IT IS MUTUALLY AGREED, That at any time or times during the term of this lease, the land demised, or any part or parts thereof, may at the option of the Lessor, on behalf of the Territory of Hawaii, or any person or persons, corporation or corporations, be withdrawn from the operation of this lease for homestead or settlement purposes, or for storing, conserving, transporting and conveying water for any purpose, or for reclamation purposes, or for forestry purposes, or for telephone, telegraph, electric power, railway or roadway purposes, or for any public purpose, or for sale for any purpose for which lands may be sold under the provisions of Section 73 of the Hawaiian Organic Act as now or hereafter amended, and possession resumed by the Lessor,

in which event the land so withdrawn shall cease to be subject to the terms, covenants and conditions of this lease, and the rent hereinabove reserved shall be reduced in proportion to the value of the part so withdrawn. (R. 35, 36.)

On July 2, 1942, the then Commissioner of Public Lands wrote appellees that Lt. General Emmons had requested that all government land of Kahanahaiki and Makua "be made immediately available to the Army for war purposes" and that therefore General Lease No. 1740 was cancelled, effective June 29, 1942 (Joint Ex. B-2; R. 34, 36).

On July 27, 1942, a similar letter respecting Lease No. 1741 was sent, cancelling it, effective December 29, 1942 (Joint Ex. C-3; R. 37, 38).

Between the time of the attack and the date they were ordered out by the Army, appellees were in joint occupation with the Army, trying to run the ranch the best they could (R. 63-65). The appellees were ordered out on June 20, 1942, but actually got out a little later (R. 65, 66). The findings of the District Court on the value of the leaseholds is not questioned here.

The counterclaim.

At appellees' request certain improvements on their fee simple land at Makua, which was occupied by the Army, were replaced on their fee simple land at Ohikilolo at the time that appellees, obeying the Army's orders, moved out of the ranch (R. 107, 322).

They consisted of some new structures and others moved from the other property (R. 102, 182, 184). Subsequently in 1943 the Makua lands were condemned by appellant in a separate proceeding (Civil No. 485; R. 112-3) and a compromise settlement was reached by the stipulation filed July 1, 1949 (R. 25-27). In compiling their figures and in arriving at the compromise appellees took into consideration these improvements (R. 107, 109, 322, 323). There was no substantial evidence to establish the counterclaim, which evidently was an afterthought of counsel, mentioned for the first time in the amended answer filed January 13, 1950 (R. 8-10). The District Court found that appellant failed to establish the counterclaim by a preponderance of the evidence (R. 16).

ARGUMENT.

I.

NO COMBAT ACTIVITIES ARE INVOLVED IN THIS CASE.

The act² under which this suit was brought contains a proviso which states:

PROVIDED, That judgment shall not be rendered against the United States with respect to any part of the alleged damages for the loss of personal property, including livestock, which arose out of the combat activities of military personnel of the United States.

²Private Law 433, 80th Cong., 2d Sess., is set forth in the Appendix.

We think any question as to whether the damages as proved in this case arose from "combat activities" is set at rest by the report³ of the Committee on the Judiciary to which the bill was referred. The Committee said:

In this connection, it should be pointed out that the Department of the Army have included in section 1 of the bill a proviso clause which would preclude judgment being rendered against the United States for the loss of personal property, including livestock, which arose out of the 'combat activities' of United States military personnel. This proviso seems unnecessary as no evidence was presented to your committee of any combat activities, as the term is generally understood, of military personnel in the areas in question. However, as stated earlier, the United States Army did engage in defensive operations, moving in artillery and military personnel, setting up camps, roads, etc., and these are the activities complained of which the estate contends resulted in the loss of its property. Your committee by adopting the bill in its entirety, including the proviso, does not intend to relieve the United States of any liability for the claimant's loss of personal property, including livestock, due to the activity of the United States forces, and if such losses are established by competent evidence to be the result of such activities the court is instructed to render judgment therefor. (H.R. Rep. No. 2063, p. 4.)

Appellant culls from the report the clause about the proviso being unnecessary, and then asserts that

³H.R. Rep. No. 2063, 80th Cong., 2d Sess. (1948).

the Committee, in saying no combat activities were involved, was inaccurately informed.

The report, based upon testimony taken in a 1945 hearing by a Subcommittee of the House of Representatives in Honolulu, at which the Army failed to present witnesses or to appear despite invitation (H.R. Rep. No. 2063, p. 3) states:

The claims of the estate of L. L. McCandless, deceased, against the United States arise out of the military operations of the United States' forces in the districts of Waianae and Waiaua, island of Oahu, in the Territory of Hawaii, on and after December 7, 1941. On that date, following the bombing of Pearl Harbor, and in defensive operations against possible Japanese invasion, United States Army contingents, including artillery, swarmed over the lands owned in fee simple or under lease by the said McCandless estate. The Army forces knocked down fences, which resulted in the loss of many cattle that were frightened out of the area, some into the forest reserve and not recoverable, and others were killed. The Army's occupation not only impeded but practically destroyed further ranch operations by the estate, and the Army's remaining in possession not only caused the loss or destruction of cattle and other personal property but also effectively deprived the estate of the land itself. No claim was here made for damages with respect to the land owned outright by the claimant, but only with respect to the lands held under lease (H.R. Report No. 2063, p. 2).

At the trial the District Court, after hearing the evidence, found:

That on December 7, 1941, military personnel of the defendant entered into possession of plaintiffs' ranch and thereafter occupied the entire premises, disrupting plaintiffs' ranching operations; that upon the initial entry only a small number of troops occupied portions of the ranch premises along the coastline, but subsequently in the year 1942, a substantial number of military personnel was deployed throughout the premises together with their equipment; that the military personnel so entering upon the plaintiffs' premises were not engaged in combat activities.

It thus appears that the Committee had in mind the very activities proved at the trial below (R. 127, 47-48, 52, 53, 78-79, 128) when it stated that combat activities were not involved in the claim and that if the acts and damages complained of were shown, the estate should have judgment.

A similar phrase using the words "combatant activities" appears in the Federal Tort Claims Act, at what is now 28 U.S.C. 2680(j), and has been dealt with in three decisions⁴ and treated by Judge Yankwich in his article, *Problems Under the Federal Tort Claims Act*.⁵ Appellant places heavy reliance on *Johnson v. United States*, decided by this Court and regarded as the leading case on the subject. We think this reliance misplaced, even if the special legislative history of Private Law 433 be disregarded. As this Court said in the *Johnson* case:

⁴*Johnson v. United States*, 170 F. 2d 767, 770 (CA 9, 1948);
Skeels v. United States, 72 F. Supp. 372, 374 (1947);
Jefferson v. United States, 74 F. Supp. 209 (1947).
⁵9 F.R.D. 143, 159-161.

The rational test would seem to lie in the degree of connectivity (170 F. 2d 770).

In considering this problem, a variety of hypothetical situations spring to mind, each differing somewhat in degree of connectivity. The most certain thing that can be said is whether the damages here arose out of "combat activities" is a mixed question of law and fact decided against the appellant below. Nothing in the *Johnson* case supports appellant's contention that all activities in preparation for a possible invasion which never would be a "combatant activity" under the Tort Claims Act in all cases and under all circumstances as a matter of law. Furthermore, whether the activities resulting in the damages here were entirely occasioned by preparation for the anticipated invasion which never came, is not clear. How cutting pipes, overturning and destroying water troughs (R. 47, 48) and burning redwood posts for firewood (R. 78) formed a part of that preparation is not established by the record.

It is to be noted that the phrase "combatant activities" was construed by this Court to be broader than the word "combat" in the *Johnson* case, *supra*. The phrase here is "combat activities." Appellant says that "combat" and "combatant" when used as adjectives are synonymous, citing Webster's New International Dictionary (2d Ed.). That they can be so is obvious. It is also obvious that a rational distinction can be drawn between them, and "combat activities" can be construed as meaning actual actions in combat. Be that as it may, the House Report as quoted

dispenses with the need for construction or speculation. No "combat activities" within the meaning of the phrase as used in this act are involved in this suit.

II.

THE LEASES COULD NOT BE WITHDRAWN FOR THE PURPOSES OF THE UNITED STATES.

Appellant's argument on this issue is based on Section 91 of the Hawaiian Organic Act⁶ which provides:

Sec. 91. That, except as otherwise provided, the public property ceded and transferred to the United States by the Republic of Hawaii under the joint resolution of annexation, approved July seventh, eighteen hundred and ninety-eight, shall be and remain in the possession, use, and control of the government of the Territory of Hawaii, and shall be maintained, managed, and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or of the Governor of Hawaii. And any such public property so taken for the uses and purposes of the United States may be restored to its previous status by direction of the President; and the title to any such public property in the possession and use of the Territory for the purposes of water, sewer, electric, and other public works, penal, sewer, electric, and

⁶For a convenient reference to the Hawaiian Organic Act in its entirety before and after the amendments of 1941, see Revised Laws of Hawaii 1935, pp. 35-67 and Revised Laws of Hawaii 1945, pp. 21-57.

other public works, penal, charitable, scientific, and educational institutions, cemeteries, hospitals, parks, highways, wharves, landings, harbor improvements, public buildings, or other public purposes, or required for any such purposes, may be transferred to the Territory by direction of the President, and the title to any property so transferred to the Territory may thereafter be transferred to any city, county, or other political subdivision thereof by direction of the governor when thereunto authorized by the legislature; PROVIDED, That when any such public property so taken for the uses and purposes of the United States, if instead of being used for public purpose, is thereafter by the United States leased, rented, or granted upon revocable permits to private parties, the rentals or consideration shall be covered into the treasury of the Territory of Hawaii for the use and benefit of the purposes named in this section (31 Stat. 159, 48 U.S.C. 511).

Appellant apparently construes this section as meaning that any public property, including lands sold or leased to private persons can be taken without compensation for the uses of the United States. Thus it is argued that under Section 91, the Territory held the lands "at the will of the United States" and could convey no more than it had (Appellant's Brief, p. 19). Such a patently erroneous construction ignores the plain wording of Section 91. The first sentence states "*that, except as otherwise provided*" ceded public property shall remain in the Territory's possession to be cared for at its expense until taken "for the uses

and purposes of the United States.” The section is not an attempt to define when property may be taken by the United States.

The lands in question however fall within the exception being public property “otherwise provided” for by Section 73 of the Hawaiian Organic Act⁷ which provides the legislative framework for the sale, exchange, lease and administration of the public lands of Hawaii. Under this section the Commissioner of Public Lands, with the approval of two-thirds of the Land Board, had the power to make General Leases No. 1740 and No. 1741.

It is well settled that when the sovereign enters into a contract it is bound just the same as if it were a private contracting party.⁸

This applies to contracts involving lands such as grants,⁹ or leases.¹⁰

Certainly it is plain that had the lands in question been sold to appellees by the Territory in fee or leased without a withdrawal clause Section 91 would provide no basis for a seizure by the United States without just compensation. Appellees were given possession of the land under leases executed by the Commissioner of Public Lands in accordance with law. Their vested rights cannot be taken from them except by

⁷U.S.C. Title 48, Sections 661-667 inclusive.

⁸*Hall v. Wisconsin*, 103 U.S. 5, 11 (1880).

⁹*Town of Pawlet v. Clark*, 9 Cranch 292, 329 (1815);
Terret v. Taylor, 9 Cranch 43 (1815).

¹⁰*Boston Molasses Co. v. Commonwealth*, 193 Mass. 387, 79 N.E. 827 (1907).

condemnation unless the withdrawal of the lands is permitted under the terms of the leases in question.

The question whether the lands covered by these leases could be withdrawn for the purposes of the United States is governed by the terms of the leases themselves. We repeat the covenant dealing with withdrawals:

IT IS MUTUALLY AGREED, That at any time or times during the term of this lease, the land demised, or any part or parts thereof, may at the option of the Lessor, on behalf of the Territory of Hawaii, or any person or persons, corporation or corporations, be withdrawn from the operation of this lease for homestead or settlement purposes, or for storing, conserving, transporting and conveying water for any purpose, or for reclamation purposes, or for forestry purposes, or for telephone, telegraph, electric power, railway or roadway purposes, or for any public purpose, or for sale for any purpose for which land may be sold under the provisions of Section 73 of the Hawaiian Organic Act as now or hereafter amended, and possession resumed by the Lessor, in which event the land so withdrawn shall cease to be subject to the terms, covenants and conditions of this lease, and the rent hereinabove reserved shall be reduced in proportion to the value of the part so withdrawn (R. 35, 36).

This language has been dealt with by the Supreme Court of Hawaii in *Ai v. Bailey*.¹¹ The question there was whether the Territory might withdraw the lands

¹¹30 Haw. 210 (1927).

for the purpose of exchange. The court held it could not. The court construed the phrase "any public purpose" as being any purpose akin to those specifically enumerated in the clause under the doctrine of *noscitur a sociis*. The court said:

In other words, we understand the expressions used in the provision in question, describing the purposes for which lands once solemnly leased can be withdrawn at the option of the lessor alone, to have been inserted and used with a restrictive intention—that is to say, in order to name certain definite purposes for which the lands can be withdrawn while at the same time leaving the leased property immune from withdrawal for any and all other purposes. * * * Leases of public lands, like leases of private lands, are entered into by lessees because they think they see an opportunity for deriving some beneficial profit to themselves from the temporary use of the property, but ordinarily, in order to secure this end the land is desired only if it can be definitely assured to the lessee for a stated period. The right of the lessor to withdraw the whole or any part of the lands at any time purely at his or its option is not ordinarily granted and is not freely to be inferred unless the language used clearly requires it. Had it been the intention of the parties to this instrument to grant to the Territory the very large powers of withdrawal now claimed, much simpler and more direct language could have been used to express that intention and understanding (30 Haw. 212, 213).

Looking at the purposes enumerated (30 Haw. 210, 211) it is obvious that they are all purposes of the

territory. It is significant that our Supreme Court in the *Bailey* case emphasized the fact that the clause specifically allowed a withdrawal for sale for designated purposes, but omitted a withdrawal for exchange, the point being that if the Territory were to give up possession it could only do so by sale and not by exchange. The same principle applies here where it is contended that the Territory might withdraw the leases for the purpose of surrendering possession to the United States. Such a purpose is outside the scope of the covenant authorizing a withdrawal.

In harmony with this construction is the provision in the clause that possession of the lands withdrawn is to be resumed "by the Lessor." Lands withdrawn for the purposes of the United States would be in the possession of the United States, not the lessor, the Territory.

In *pari materia* with the words "public purposes," are those words as used in Section 73 of the Organic Act at the time the leases in question were made and prior to the 1941 amendment. Section 73(q) then provided:

(q) All lands in the possession, use, and control of the Territory shall hereafter be managed by the commissioner, except such as shall be set aside for public purposes as hereinafter provided; all sales and other dispositions of such land shall be made by the commissioner or under his direction, for which purpose, if necessary, the land may be transferred to his department from any other department by direction of the gover-

nor, and all patents and deeds of such land shall issue from the office of the commissioner, who shall countersign the same and keep a record thereof. Lands conveyed to the Territory in exchange for other lands that are subject to the land laws of Hawaii, as amended by this Act, shall except as otherwise provided, have the same status and be subject to such laws as if they had previously been public lands of Hawaii. All orders setting aside lands for forest or other public purposes, or withdrawing the same, shall be made by the governor, and lands while so set aside for such purposes may be managed as may be provided by the laws of the Territory. The commissioner is hereby authorized to perform any and all acts, prescribe forms of oaths, and, with the approval of the governor and said board, make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this section and the land laws of Hawaii into full force and effect (U.S.C. Title 48, Sec. 677).

Had withdrawal for the use of the United States been contemplated then it would not have been provided that lands so withdrawn were to be managed as provided by the laws of the Territory for lands in the possession of the United States would, of course, be managed according to federal law.

When it became apparent that it would be advisable to authorize the withdrawal of land for federal purposes, Congress made appropriate provisions therefor by enacting the statute of August 21, 1941 (55 Stat., 658, Ch. 394) by which Section 73(q) of the Organic Act was amended.

That section, as so amended, provides that:

* * * All orders setting aside lands for forest or other public purposes, or withdrawing the same, shall be made by the governor, and lands while so set aside for such purposes may be managed as may be provided by the laws of the Territory; the provisions of this paragraph may also be applied where the 'public purposes' are the uses and purposes of the United States, and lands while so set aside may be managed as may be provided by the laws of the United States. * * * (48 U.S.C.A., Sec. 677, R.L.H. 1945, p. 42).

If Section 73 of the Organic Act as it originally stood authorized the withdrawal of leased land for federal purposes, the passage of that act would not have been necessary.

Appellant argues from the legislative history of the amendment that it was only intended to make a change as to lands acquired after the annexation and that hence "public purposes" as used in Section 73(q) before the amendment must be held to include federal purposes when applied to ceded lands. However, to say that "public purposes" a phrase expressed only once in the withdrawal clause meant territorial purposes only as to after acquired lands and territorial and federal purposes as to ceded lands is absurd. The act makes no such distinction.

As the legislative history of the amendment shows, H.R. Rep. No. 831, 77th Cong., 1st Sess., the act was passed as a result of a memorial to Congress contained in Senate Concurrent Resolution 11, passed by the legislature of Hawaii, April 19, 1941, at its regular ses-

sion. In Standing Committee Report No. 105, Senate Journal, Twenty-first Legislature of Hawaii, page 350, it is stated:

The purpose of this concurrent resolution is to present a bill to Congress amending Section 73 of the Organic Act so as to provide a method whereby lands acquired by the Territory after annexation may be set aside by the Governor for the uses and purposes of the United States. At the present time there is no provision in the Organic Act which covers this situation, as Section 91 of the Organic Act only covers the setting aside to the United States of lands ceded upon annexation.

Thus it appears that the power to take ceded lands for federal purposes prior to the amendment was contained in Section 91 rather than Section 73 and we have already shown that Section 91 did not and does not apply in the case of lands under lease or sold by the Commissioner of Public Lands under Section 73. Thus it is apparent that until the amendment which expressly provided for a withdrawal of lands for federal purposes *and the management of such lands by the laws of the United States*, "public purposes" as used in Section 73 and as used in the leases in question did not include purposes of the United States and that therefore the taking by the United States without just compensation was wrongful.

We have already discussed the construction of the leases involved so we will not deal specifically with appellant's argument on that point except to note the complete failure to mention the controlling precedent, *Ai v. Bailey*, *supra*.

III.

**APPELLANT FAILED TO PROVE ITS COUNTERCLAIM
BY A PREPONDERANCE OF THE EVIDENCE.**

The facts in the record with respect to appellant's counterclaim, which are somewhat scanty at best, are set forth in our statement of the evidence.

It will be noted that when the Army ordered appellees out of their ranch on June 20, 1942 (Pl. Ex. D; R. 64, 65) including the Makua fee simple lands, the Army was (at appellees' request) replacing certain installations on those lands on other fee simple lands of appellees' at Ohikilolo and thus the move from Magua was delayed pending the installation of those replacements (R. 67). The Army actually "came down and moved" appellees out of the fee simple land and the leases which comprised the ranch (R 65). Some of the installations made at Ohikilolo consisted of equipment removed from the Makua fee lands and some were new (R. 102, 182, 184). This removal from the Makua fee lands at the order of the Army shortly after June 20, 1942, was many months prior to the filing of a condemnation proceeding against those lands in 1943 (R. 113).

Appellant's "counterclaim" is stated in its answer as follows:

Following the termination of the leases referred to in the complaint the defendant expended the sum of \$23,868.52 in the construction of buildings and facilities on other lands owned by the plaintiffs. These expenditures were made in connection with removal of the plaintiffs' ranch activities from the leased property to said other

lands. Should damages be awarded based upon termination of the leases, the defendant prays that it be allowed the aforesaid sum of \$23,868.52, as a setoff. (R. 9).

All the evidence indicates that the expenditure pleaded was not in connection with the removal of appellees' ranch activities from the leased land but from the fee lands from which appellees were being ejected without an eminent domain proceeding and without claim of right.

No evidence has been introduced to show that the replacements made were bargained for between the parties or that it was contemplated by the parties that the government should be recompensed for the expenses incurred. As a part of the ouster of appellees from their lands the government replaced (at appellees' request certain facilities it was seizing. Such facts provide no basis for recovery either in contract or quasi-contract. The benefit conferred, if any, has not been shown to have been done with an express or implied expectancy or understanding of repayment and hence stands as merely a gratuity given appellees to placate them for wrongs done them which are not in the scope of this action. Originally a claim had been made to the Army for the seizure of the fee simple lands and damage thereon but it was abandoned when the condemnation was filed since appellees felt they would be compensated in that action (R. 112).

In addition it was testified that in compromising the Makua condemnation, appellees took into consid-

eration the facilities replaced at Ohikilolo (R. 107, 109, 322, 323). There was no evidence that the replacements were not so considered. Appellant's brief (p. 9) cites the remarks of government counsel to the effect that the government did not take these improvements into consideration in compromising the condemnation. Counsel's statements are not evidence.¹² Certainly the question of the value of the replacements was germane to a settlement of the Makua fee lands condemnation.

Summed up, it is apparent that the improvements made by the government on the Ohikilolo property were to replace those on the Makua fee lands at a time when those lands were being seized without claim of right. There is no evidence that the improvements were made in the expectation or on the understanding of repayment, and furthermore the evidence is that appellees in settling the later condemnation of those fee lands made allowance for those improvements. The District Court found that appellant failed to establish its counterclaim by a preponderance of the evidence and accordingly denied it (R. 16). This finding of fact not being "clearly erroneous" should not be disturbed here.

¹²⁶ *Wigmore on Evidence*, Sec. 1806.

CONCLUSION.

For the reasons stated the judgment should be affirmed.

Dated, Honolulu, Hawaii,
January 31, 1951.

Respectfully submitted,
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ROBERTSON, CASTLE & ANTHONY,
Of Counsel.

(Appendix Follows.)

Appendix.

Appendix

Private Law 433—80th Congress
Chapter 747—2d Session
H.R. 915

AN ACT

To confer jurisdiction upon the District Court of the United States for the Territory of Hawaii to hear, determine, and render judgment on the claims of the executors and trustees of the estate of L. L. McCandless, deceased, as their interests may appear against the United States of America.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the District Court of the United States for the Territory of Hawaii to hear, determine, and render judgment upon the claims of the executors and trustees of the estate of L. L. McCandless, deceased, as their interests may appear, against the United States of America for damages, if any, but not exceeding the sum of \$46,155, for the loss of personal property including the loss of livestock, alleged to have been caused by military personnel of the United States, and for damages, if any, but not exceeding the sum of \$67,500 for the alleged illegal withdrawal of the Government lands covered by General Leases Numbers 1740 and 1741 of the Territory of Hawaii, each dated December 29, 1925, from the operation of those leases for use by the United States Army for war purposes:

Provided, That judgment shall not be rendered against the United States with respect to any part of the alleged damages for the loss of personal property, including livestock, which arose out of the combat activities of military personnel of the United States.

Sec. 2. Proceedings for the determination of these claims shall be had in the same manner as in cases against the United States of which the district courts of the United States have jurisdiction under the provisions of section 24 of the Judicial Code, as amended: Provided, that suit hereunder shall be instituted within one year after the enactment of this Act: And provided further, That this Act shall be construed only to waive the immunity from suit of the Government of the United States and to confer jurisdiction upon said court to hear, determine, and render judgment upon the claims of the executors and trustees of the estate of L. L. McCandless, deceased, described in section 1 hereof, and not otherwise to affect any substantive rights of the parties.

Approved June 29, 1948.

No. 12,680

IN THE

**United States Court of Appeals
For the Ninth Circuit**

UNITED STATES OF AMERICA,

Appellant,

VS.

A. LESTER MARKS, ELIZABETH LOY
MARKS, and HERBERT M. RICHARDS,
Trustees of the Estate of L. L. Mc-
Candless, Deceased,

Appellees.

Upon Appeal from the United States District Court
for the Territory of Hawaii.

REPLY BRIEF FOR THE UNITED STATES, APPELLANT.

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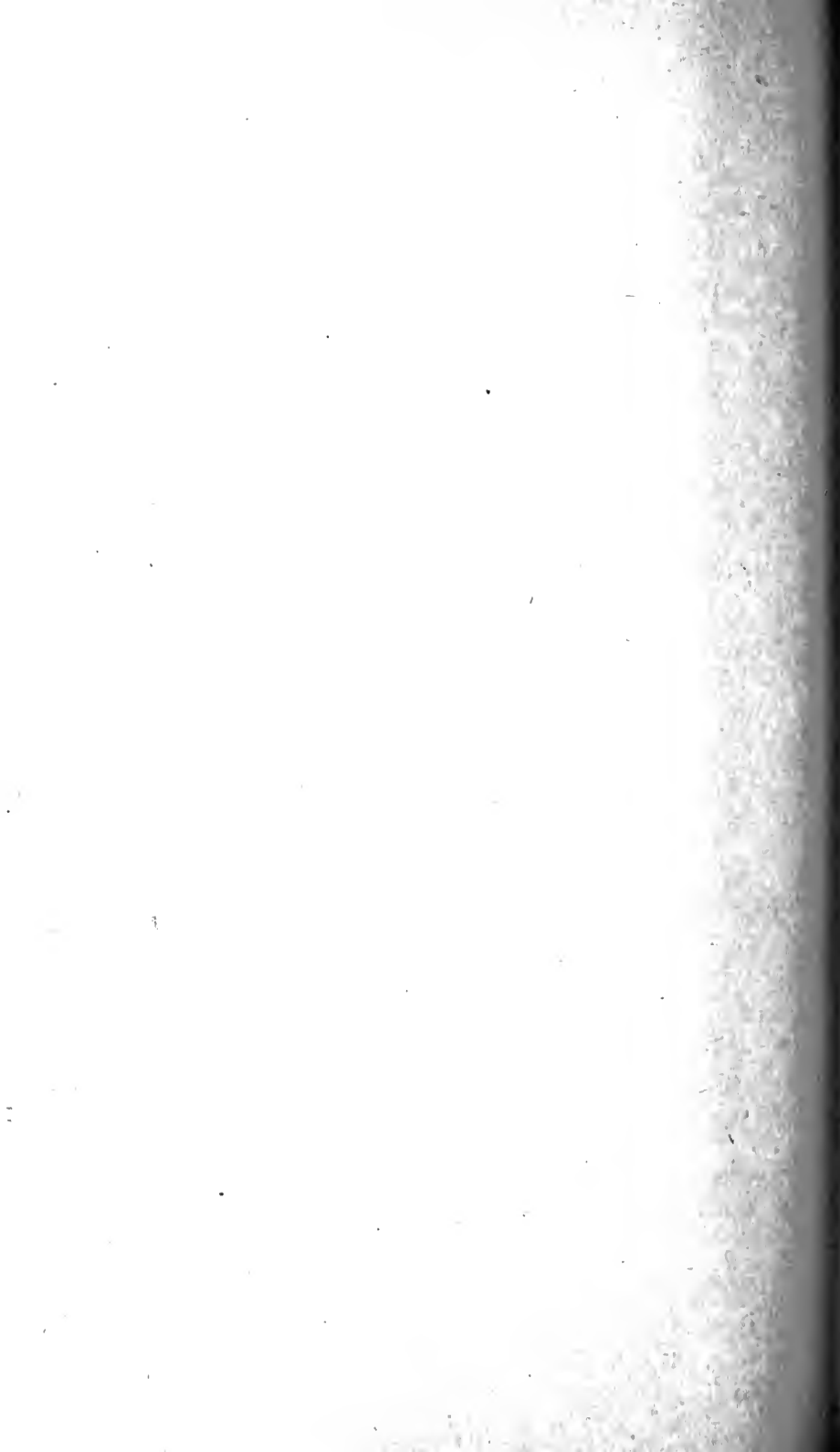
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Appellees.

Upon Appeal from the United States District Court
for the Territory of Hawaii.

REPLY BRIEF FOR THE UNITED STATES, APPELLANT.

I.

**THE DAMAGES TO THE PERSONAL PROPERTY AROSE OUT OF
THE COMBAT ACTIVITIES OF MILITARY PERSONNEL OF
THE UNITED STATES.**

Seemingly, appellees acquiesce in the Statement of the Government's brief. In consequence, they do not controvert its assertion (Br. 13) that "there was no dispute as to the time, physical nature, and purpose of the activities causing the damage" and hence that

this appeal involves "only the construction of the term 'combat activities'." However, they rely upon the report of the subcommittee favorably reporting the bill which became the jurisdictional Act. And, without disputing the Government's charge (Br. 16-17) that the report confused the military activities which occurring immediately after Pearl Harbor caused the damages with other activities which took place months after, they contend (Br. 6, et seq.) the report is to be taken as establishing that the activities causing the damage were noncombatant in character. Of course, this is not so.

Whether or not representatives of the Army should have appeared before the subcommittee, the fact remains they did not appear and accordingly the subcommittee heard but one side of the case. As has been pointed out, it confused the facts. In addition, it thought that appellees had been damaged in the sum of \$113,655 and it favored legislation *giving* them this amount. Yet, in this suit brought under the jurisdictional Act substituted at the urging of the Department of Defense, appellees could only establish damages of \$65,894 or \$58,760 less than the subcommittee thought had been sustained. It is apparent, therefore, that the views of the subcommittee—derived as they were from the allegations of appellees—cannot be taken as foreclosing any issue of fact in this suit.

In its opening brief the Government showed that the activities which caused the damage to personal property occurred on and within ten days after the

attack on Pearl Harbor,¹ that the activities were emergency measures to repel an expected renewal of the attack and that the area was a combat zone. Clearly then they were "combat activities" as the term was used in the jurisdictional Act. Appellees' suggestion (Br. 8) that such activities only occur "in combat" would make the term meaningless. Thus, when the Defense Department suggested the proviso, it—and everyone else—knew that the damages had not been sustained in battle with the Japanese. Certainly then the proviso was inserted to exempt the Government from liability for *other* activities of its soldiers. Furthermore, since it would be virtually impossible to determine by which side damages sustained "in combat" were caused, there would be no need to exempt the United States from liability for damages sustained in combat. Therefore, unless the term covers activities closely connected with combat—like those here involved—it has no meaning or effect.

II.

THE LEASES WERE LAWFULLY CANCELED.

A. The withdrawal was authorized by the Organic Act.

So far as material, section 91 of the Organic Act provides:

Except as otherwise provided, the public property ceded and transferred to the United States by the Republic of Hawaii, under the joint resolu-

¹The first paragraph of appellees' statement (Br. 2) recites this fact.

tion of annexation * * * shall remain in the possession, use and control of the government of the Territory * * * and shall be maintained, managed and cared for by it, at its own expense, until * * * taken for the uses and purposes of the United States by direction of the President or of the Governor of Hawaii. (Emphasis added.)

And at pages 18-21 of its opening brief, the Government pointed out that the lands here involved—ceded by the joint resolution of annexation—were taken for the use of the Army for war purposes and consequently appellees were not entitled to be compensated for loss of the leases granted them by the Territory. Or, as it was put at page 19: “As section 91 makes plain, the Territory possessed the lands at the will of the United States [and] could not of course grant the appellees any more than it had.”

In effect—as the Government understands their position—appellees contend (Br. 10-18) that the four words at the beginning of section 91, emphasized above, removed the lands in question from the operation of that section, subjected them to the terms of section 73 of the Act, and—so appellees argue—consequently abrogated the power of the United States acting either through the President or the Governor validly to resume possession of the lands for national purposes.

At each step, the argument bogs down. Thus, if because of “except as otherwise provided”, section 91 no longer governed these lands, then they also ceased to be “in the possession, use, and control of the gov-

ernment of the territory" (for that provision precedes the one giving the President and Governor the power to withdraw) and reverted to the United States. Section 73(q), 48 U.S.C. sec. 677, gives to the commissioner authority to manage "All lands in the possession, use, and control of the Territory" i.e., the lands referred to in section 91. In the second place, there is nothing in section 73 that even hints that leased lands may not be withdrawn pursuant to section 91.

Appellees observe—correctly—that the United States could not withdraw the lands if the Territory had *sold* them. (Br. 11, 12.) But lands sold by the Territory are no longer public lands. Thus in section 73(c), 48 U.S.C. sec. 664, Congress has indicated that land patents would be issued by the territorial government and in subsections (j), (k), and (l), 48 U.S.C. secs. 671-673, has authorized the sale of public lands to settlers, religious organizations and individuals for residential and business purposes. Subsections (f) and (g), 48 U.S.C. secs. 667 and 668, recognize that land patents or homestead leases will be issued after the conditions of various homestead agreements are met. The United States cannot take these patented lands without making compensation therefor because with the approval of Congress the lands have been transferred to individuals in fee and have lost their status as public lands, so that nothing is left upon which the right of the United States reserved in section 91 could operate. On the other hand, there is no indication in section 73 or in any other statute, federal or territorial, that lands under a general lease would

lose their status as public lands thereby. Such lands remain public lands and are subject to the exercise of the right reserved by the United States in section 91.²

In the light of the foregoing, appellees' further argument (Br. 13-15), that the provisions of the lease granted by the Territory govern, is irrelevant and the decision in *Ai v. Bailey*, 30 Haw. 210 (1930) is immaterial. Moreover, that case supports the Government's position. For in holding that the power to withdraw "for any public purpose" did not permit the Territory to cancel the lease so that it could convey the land to a private corporation and receive in return other land, the Court said (pp. 210-211): "Read, however, in connection with the remaining language of the lease under consideration, we think that the requirements of English, common sense and common experience do not permit of this construction, but *indicate on the contrary that the expression was used as meaning that the lands to be withdrawn were to be themselves devoted to a public use and were not to be given away in exchange for other lands which in turn would be devoted to the public use. The doctrine noscitur a sociis applies.*" (Emphasis added.) In other words, since the lands leased to appellees were

²This is recognized in the provision of section 73(j), 48 U.S.C. sec. 671, enacted long before 1941, authorizing transfer to other lands of a preference right to purchase frustrated because "such parcel of public lands is reserved for public purposes, either for the use of the United States or the Territory of Hawaii".

to be devoted to the use of the Army, their withdrawal was expressly authorized by the lease provisions.³

B. The leases themselves provided for cancellation if the lands were needed by the United States.

Apart from its invocation of *Ai v. Bailey*, appellees do not answer the Government's contention under this head. Since the *Bailey* case sustains the Government's position it is abundantly plain that for the reasons given in the opening brief the terms of the leases authorized their cancellation when the lands were needed by the Army.

III.

THE TRIAL COURT ERRED IN DENYING THE GOVERNMENT'S CLAIM FOR SET-OFF.

Appellees make no answer to the Government's argument that the trial Court erred in denying its claim for set-off on the grounds that it was irrelevant to the subject matter and had not been established by a preponderance of the evidence. Instead they assert (Br. 19-21) that no evidence was introduced to show that the parties contemplated the work should be paid for and suggest that the Army intended to confer a gratuity. But it is obvious that none of the representa-

³As was pointed out in the Government's opening brief (pp. 19-21) the amendment of section 73(q) by the Act of August 21, 1941, extended the withdrawal power to lands acquired by the Territory since annexation. Appellees' quotation from the legislative history of the amendment (p. 18) confirms this and the point of its discussion of the effect of the amendment (pp. 15-18) is not apparent to the Government.

tives of the Government was authorized to make gifts of public money or other property to appellees. Such extraordinary power clearly would have to be expressly conferred by statute (cf. *District of Columbia v. Johnson*, 165 U.S. 330, 338 (1897)) and of course there is no such statute. It follows that appellees are liable for the value of the cost of the material and labor expended upon their property.

CONCLUSION.

For the foregoing reasons, it is submitted that the judgment appealed from should be reversed.

Dated, February 5, 1951.

Respectfully,

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No. 12,680

IN THE

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

VS.

A. LESTER MARKS, ELIZABETH LOY MARKS
and HERBERT M. RICHARDS, Trustees of
the Estate of L. L. McCandless, De-
ceased,

Appellees.

PETITION FOR A REHEARING.

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No. 12,680

IN THE

**United States Court of Appeals
For the Ninth Circuit**

UNITED STATES OF AMERICA,

Appellant,

vs.

A. LESTER MARKS, ELIZABETH LOY MARKS
and HERBERT M. RICHARDS, Trustees of
the Estate of L. L. McCandless, De-
ceased,

Appellees.

PETITION FOR A REHEARING.

*To the Honorable William Denman, Chief Judge, and
to the Honorable Associate Judges of the United
States Court of Appeals for the Ninth Circuit:*

We respectfully petition this Court for a rehearing
upon the following grounds that this Court erred:

(1) In ruling that the loss of appellees' livestock
arose out of "combat activities."

(2) In holding that appellees could not recover for
the wrongful seizure and occupancy of their leasehold.

ARGUMENT.

- (1) **THE LOSS OF APPELLEES' CATTLE, PIGS AND HORSES DID NOT ARISE OUT OF COMBAT ACTIVITIES WITHIN THE MEANING OF THAT TERM AS USED IN PRIVATE LAW 433, 80TH CONG., 2d SESS.**
- A. The legislative history of the act makes it clear that the injuries proved were not within the scope of the exception for injuries arising out of combat activities.

The crux of the court's opinion on this point appears to be contained in the following paragraph:

During the period involved, as this court early recognized, the situation in the Islands was one of gravest emergency. The troop movements here did not involve long-range defensive operations, nor were they activities remote in time or place from a zone of actual combat. They represented, rather, the instinctive reaction of the military to counter what was felt to be a present threat. The relation between the surprise attack on Pearl Harbor and the deployment of the troops was so immediate and imperative that they can not be regarded otherwise than as part of a single episode of warfare (Opinion p. 5).

As a finding of fact, totally unsupported by the evidence, this will be more fully dealt with later under Point I(B). For the purpose of the present discussion we temporarily pass over its lack of support in the record.

Assuming for the moment that the injuries complained of were a necessary concomitant of the deployment of the troops on the appellees' lands and that that deployment was not part of a "long-range

defensive operation" but was "the instinctive reaction of the military," nevertheless the deployment was a defensive operation in preparation for an anticipated invasion as the record makes clear (R. 141-144, 47-48, 52, 53, 127, 128) and as such was clearly not within the intendment of the phrase "combat activities" in the act (Private Law 433, 80th Cong., 2d Sess.) as the Committee report makes clear (H.R. Rep. No. 2063, 80th Cong., 2d Sess., 1948). In our brief (pp. 6, 7) the two following excerpts from this report were quoted:

In this connection, it should be pointed out that the Department of the Army have included in section 1 of the bill a proviso clause which would preclude judgment being rendered against the United States for the loss of personal property, including livestock, which arose out of the 'combat activities' of United States military personnel. This proviso seems unnecessary as no evidence was presented to your committee of any combat activities, as the term is generally understood, of military personnel in the areas in question. However, as stated earlier, the United States Army did engage in defensive operations, moving in artillery and military personnel, setting up camps, roads, etc., and these are the activities complained of which the estate contends resulted in the loss of its property. Your committee by adopting the bill in its entirety, including the proviso, does not intend to relieve the United States of any liability for the claimant's loss of personal property, including livestock, due to the activity of the United States forces, and if such

losses are established by competent evidence to be the result of such activities the court is instructed to render judgment therefor (H.R. Rep. No. 2063, p. 4).

* * * *

The claims of the estate of L. L. McCandless, deceased, against the United States arise out of the military operations of the United States' forces in the districts of Waianae and Waialua, island of Oahu, in the Territory of Hawaii, on and after December 7, 1941. On that date, following the bombing of Pearl Harbor, and in defensive operations against possible Japanese invasion, United States Army contingents, including artillery, swarmed over the lands owned in fee simple or under lease by the said McCandless estate. The Army forces knocked down fences, which resulted in the loss of many cattle that were frightened out of the area, some into the forest reserve and not recoverable, and others were killed. The Army's occupation not only impeded but practically destroyed further ranch operations by the estate, and the Army's remaining in possession not only caused the loss or destruction of cattle and other personal property but also effectively deprived the estate of the land itself. No claim was here made for damages with respect to the land owned outright by the claimant, but only with respect to the lands held under lease (H.R. Report No. 2063, p. 2).

Thus we see that defensive operations of the type here proved were expressly stated *not* to be within the intendment of the phrase "combat activities."

This the Court chose to cast aside in a footnote on the ground that the meaning of the phrase is "too plain to permit a resort to extraneous evidence of the legislative intent." While it is true that plain words in a statute cannot be overcome by legislative history (*Ex Parte Collett*, 337 U.S. 55), where there is ambiguity the legislative interpretation at the time of enactment will be followed (*Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, 336 U.S. 301).

The statement in the footnote that the phrase is so plain of meaning that no resort to legislative intent is possible is unsupportable. The phrase "combat activities" is so patently ambiguous that extended argument does not seem necessary. Every decision turning on whether an act was a combat activity must necessarily turn on mixed questions of law and fact and be one of degree. If any support (outside of common experience) were necessary for the view that the term "combat activities" is not plain but is ambiguous the following excerpt from the testimony of appellant's military expert should suffice:

The Witness: Yes, I have the question. It is very difficult even for a military man to define combat, but in a general sense everything that took place on this island shortly after the attack on December 7 involved combat. We construe our overseas tours of duty, for instance—if we are in a combat zone, although there might not be a shot fired, we get credit for combat service. So I would say that it certainly approaches a combat

situation although categorically it is a difficult question to answer (R. 144-5).

To this we might add that the fact there are three reported cases (*Jefferson v. United States*, 74 F. Supp. 209 (1947); *Johnson v. United States*, 170 F. 2d 767 (CA 9, 1948); *Skeels v. United States*, 72 Supp. 372 (1947)) dealing with the construction of the similar phrase "combatant activities" in the Federal Tort Claims Act (28 U.S.C. 2680(j)) is not without significance.

This Court erred in holding that "combat activities" was so plain of meaning as to preclude resort to legislative history and thus misconstrued the statute, depriving appellees of the compensation justly due them for the wrongs committed.

- B. This Court erred in ignoring the findings of fact of the court below and in making contradictory findings unsupported by the evidence.**

Findings 4 and 5 of the court below are as follows:

4. That on December 7, 1941, military personnel of the defendant entered into possession of plaintiffs' ranch and thereafter occupied the entire premises, disrupting plaintiffs' ranching operations; that upon the initial entry only a small number of troops occupied portions of the ranch premises along the coastline, but subsequently in the year 1942, a substantial number of military personnel was deployed throughout the premises together with their equipment; that the military personnel so entering upon the plaintiffs' premises were not engaged in combat activities.

5. That as a direct result of the activities of the military personnel on the premises, fences, paddocks and corrals were destroyed and caused livestock of plaintiffs to be dispersed throughout the countryside which resulted in damage to the plaintiffs as follows:

(a)	287 head of cattle lost	\$12,915.00
(b)	Cost to plaintiffs of recovering stray cattle	2,079.00
(c)	200 pigs	3,000.00
(d)	2 horses	250.00
(e)	Loss of 500 bags, 400 bags of algaroba beans and 200 redwood posts	190.00
(f)	Value of General Leases 1740 and 1741 for $4\frac{1}{3}$ years	41,460.29
(g)	Rental value of house and guest cottage	6,000.00
Total		<u>\$65,894.29</u>

(R. 15-16)

This Court in its opinion states that "the military activities on the ranch were confined to the erection of barbed wire entanglement and to the guarding and patrolling of the beach" (p. 4). Assuming this to be correct it is difficult to see how the dispersal of the cattle made possible by the cutting of the fences but caused by the cutting of the water pipes and destruction of the water troughs (R. 50-51, 48) or the dispersal of the pigs involving their shooting by the troops (R. 52-53) or the death of the horses resulting from the cutting of the fence (R. 52) or the leaving open of a gate (R. 128) can be said to be the result of

“combat activities” even if the military activities described by this Court can be said to have been such. The cutting of pipes, the destruction of water troughs, the shooting of animals, and the leaving open of gates are not military activities. Even the cutting of the fences need not have resulted in the loss of appellees’ livestock for the exigencies were not such as to prevent the erection of temporary barriers where fences were necessarily cut (Ex. B).

The Court’s earlier findings (Opinion, p. 5) that “the troop movements here did not involve long-range defensive operations” but that they represented the “instinctive reaction of the military to a present threat” and that the deployment of the troops was so closely connected with the Pearl Harbor attack that they must be regarded as “a single episode of warfare” are totally unsupported by the record. Moreover these observations appear to reflect upon the professional competence of the military command. Where is the testimony which supports the finding that this deployment was not part of a long-range defensive operation? Where is the testimony which says this deployment was an “instinctive reaction?” Surely our defenses do not rest on instinctive reactions. Where is the testimony that says this deployment on appellees’ lands and the Pearl Harbor attack were so closely related as to be part of a “single episode of warfare?” The testimony of Colonel Fielder, the only professional military man to testify is offered on the question of the soundness of these findings:

Q. And were you familiar with the general activities on Oahu during that period, particularly, as they affected the military situation?

A. Yes, I was. I was probably more familiar with it than any other officer, because that was part of my duties.

Q. Will you tell us what the activities were?

A. Well, the military activities after the attack on December 7 consisted primarily of the preparation for possible invasion, although the top military people—they didn't know whether the Japanese would attempt to land or not. The ground forces defending this island, in particular, had to be prepared. Consequently, most of the time was spent in stringing barbed wire and in placing artillery pieces, machine guns, mortars, 37 mm. guns, and light weapons and equipment for the defense of the beaches in the event of a landing of the Japanese.

Q. What was the general anticipation, particularly in so far as the military was concerned, with regard to possible invasion?

A. They thought it was possible that raids might be attempted by the Japanese, to say the least. An all-out invasion to capture the islands seemed not too probable, but possible. After all, the Military didn't think that the Japs would attack the place in the first place, so they felt that there was always a threat of an attempted invasion.

Q. Was there a general anticipation of some attack or invasion?

A. There was definitely anticipation of raids, agents being landed from submarines, air tights, and the like.

(R. 140-141)

We submit that as a matter of fact as well as of law the military activities out of which the injuries complained of arose were not combat activities.

(2) THIS COURT ERRED IN HOLDING THAT THE APPELLEES CANNOT RECOVER FOR THE WRONGFUL SEIZURE AND OCCUPANCY BY THE GOVERNMENT OF THEIR VESTED LEASEHOLD.

A. This Court held that public lands leased by the territory might be withdrawn from the leases without compensation regardless of the terms of the leases.

(1) To reach this result the Court misconstrued Section 91 of the Hawaiian Organic Act.

Section 91 of the Hawaiian Organic Act provides in part:

Except as otherwise provided, the public property ceded and transferred to the United States by the Republic of Hawaii, under the joint resolution of annexation, approved July 7, 1898, (30 Stat. 750) shall remain in the possession, use, and control of the government of the Territory of Hawaii, and shall be maintained, managed, and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or of the governor of Hawaii * * *.

The Court in its opinion (p. 9) construed this section as giving the United States the power to take possession of leased public lands without paying any compensation to the lessee regardless of the terms of the lease. It is apparent even on a cursory reading

that such a construction is without merit. The clause quoted states that except as otherwise provided ceded public lands are to remain in the possession of the territory until other disposition is made by Congress or until taken for the purposes of the United States. No one disputes that the Territory of Hawaii under Section 73 of the Organic Act had the power to lease these lands and surely it cannot be doubted that after lands are leased to others they are no longer "in the possession" of the territory. The clause in question makes it apparent that the lands subject to being set aside for the purposes of the United States are lands in the possession of the territory and that lands under lease cannot be so set aside. The lands here in question were lands not retained in the possession of the territory because they were otherwise provided for by the power to lease conferred on the Commissioner of Public Lands under Section 73 and by the exercising of that power by the granting of General Leases 1740 and 1741.

If the Court's construction of Section 91 is correct, then that section is in direct conflict with Section 73(d) of the Organic Act which provides that leases of "lands suitable for the cultivation of sugar cane" unlike leases of other agricultural lands can be made without a clause allowing withdrawal for homestead or public purposes in which event it is expressly stated that "land so leased shall not be subject to withdrawal."

- (2) This Court erred in holding that the government might destroy vested interests in land at will without paying compensation.

In our brief (p. 12) we pointed out that when the sovereign enters a contract it is bound the same as a private party, *Hall v. Wisconsin*, 103 U.S. 5, 11 (1880) and that this principle applied to leases, *Boston Molasses Co. v. Commonwealth*, 193 Mass. 387, 79 N.E. 827 (1907) as well as to other grants. *Town of Pawlet v. Clark*, 9 Cranch 292, 329 (1815), *Terret v. Taylor*, 9 Cranch 43 (1815). This Court in a footnote (n. 13, p. 9), to its opinion concedes that this may be true as to sale of the fee, but it is not true as to leases because leased land remains public land. This conflicts with Section 73(h) which provides that on forfeiture of a homestead lease the leased lands resume their status as public lands.

Furthermore, the attempted distinction ignores the fact that leaseholds for a term have been recognized by the law as vested interests entitled to equal protection with freehold interests for nearly five hundred years.

If such interests are subject to destruction at will, then the territorial leases of sugar lands under Section 73(d) of the Organic Act, of right of purchase leases under Section 73(f) or of homestead leases under Section 207 of the Hawaiian Homes Commission Act 1920, 48 U.S.C. 701 have become mere tenancies at will and the whole attempt of Congress by Section 73 of the Hawaiian Organic Act to set up an orderly administration of public lands of Hawaii so

that they might be leased, utilized and developed by the people is frustrated.

Congress delegated to the Commissioner of Public Lands by Section 73 of the Organic Act the power to lease public lands. The sovereign cannot, under the law, destroy the interests created by such leases without compensation unless the leases themselves so provide, for when the sovereign enters a contract it descends to the level of a private individual and stands equally before the law as any contracting party.

(3) This Court erred in misconstruing *United States v. Chun Chin*, 150 F. 2d 1016.

This Court, to support its construction of Section 91 (permitting the destruction at will and without compensation of leasehold interests in public lands of the territory regardless of the terms of the leases involved) cites *United States v. Chun Chin*, 150 F. 2d 1016 and baldly states that that case so held. If so, the significance of the case escaped counsel in the present case (it was not even cited by either side) and certainly a study of the opinion reveals no such holding. It will be recalled that when the *Chun Chin* case was referred to at argument by the court, government counsel agreed that it had nothing to do with the issues here. If that case holds what this Court says it does, it is simply wrong, but we submit that its only holding is that a condemnation proceeding was not an appropriate action in which to assert the lessee's claim for damages. This is what the opinion

says, and that is the only significance of the citation of *United States v. North American Co.*, 253 U.S. 330.

The answer to the procedural holding of the *Chun Chin* case, is that this is an appropriate proceeding in which to enforce appellees' claim inasmuch as it is a suit on a private act and not a condemnation proceeding.

- B. This Court erred in construing General Leases Nos. 1740 and 1741 as permitting a withdrawal of the lands demised for the public purposes of the United States.**

Leases Nos. 1740 and 1741 contain the following proviso:

IT IS MUTUALLY AGREED, That at any time or times during the term of this lease, the land demised, or any part or parts thereof, may at the option of the Lessor, on behalf of the Territory of Hawaii, or any person or persons, corporation or corporations, be withdrawn from the operations of this lease for homestead or settlement purposes, or for storing, conserving, transporting and conveying water for any purpose, or for reclamation purposes, or for forestry purposes, or for telephone, telegraph, electric power, railway or roadway purposes, or for any public purpose, or for sale for any purpose for which land may be sold under the provisions of Section 73 of the Hawaiian Organic Act as now or hereafter amended, and possession resumed by the Lessor, in which event the land so withdrawn shall cease to be subject to the terms, covenants and conditions of this lease, and the rent hereinabove reserved shall be reduced in proportion to the value of the part so withdrawn (R. 35, 36).

This Court construed the phrase "any public purpose" as being broad enough to include public purposes of the United States. As we pointed out in our brief, this language was construed in *Ai v. Bailey*, 30 Haw. 210 (1927) to be governed by the canon of construction *noscitur a sociis*. Since the specific public purposes set forth are obviously territorial purposes, the phrase "any public purpose" obviously means any *territorial* public purpose, not any public purpose of the United States.

Any other construction of the withdrawal covenant would render the language of the covenant "and possession resumed by the Lessor" (i.e., the Commissioner of Public Lands) meaningless.

C. This Court erred in holding that there had been a prior construction of the lease binding on appellees.

Appellant introduced in evidence a letter (Ex. 3; R. 173) from the Commissioner of Public Lands dated January 16, 1929, withdrawing 8.84 acres by executive order from Lease No. 1740. Nothing by way of explanation or elucidation with reference to this letter was put in evidence by either side. This Court seized upon the letter as a construction of "public purposes" by the parties binding upon the appellees.

At the time of the seizure Leases Nos. 1740 and 1741 comprised 4792.72 acres which were valued by the Court as being worth \$2 per acre per annum to appellees. Assuming the value per acre in 1929 had risen to the value found in 1941, the loss involved in

the withdrawal would have been \$318 for the 18 years of the leases which figure reduced to present worth would have amounted to something under \$150. Assuming the value in 1929 was the same as 1926, the damage was zero. In any event it was too inconsequential to warrant a contest. Moreover the withdrawal of 8.84 acres would hardly affect the operations of a ranch of this size. To say that the lessee by acquiescing in the withdrawal of 8.84 acres waived his right to resist confiscation of the whole leasehold of 4792.72 acres is to reduce a rule of construction to an absurdity.

CONCLUSION.

This Court has construed two acts of Congress in a manner which utterly defeats the legislative will. The construction of Private Law 433 adopted by this Court in effect says that the Congress was doing an idle act when it passed the jurisdictional bill to permit suit and never really intended appellees to have any relief for the damage done. This error affects only the appellees.

The other and more serious error (the misinterpretation of the Hawaiian Organic Act) contrary to the settled administrative construction since the very beginning of a territorial government in Hawaii, affects the entire system of public lands of Hawaii. In one stroke this Court has unwittingly rendered all leases of public lands subject to a hitherto unsuspected congenital defect—the exposure to the risk that at any

time the federal government could confiscate leaseholds with valuable improvements placed on the land without compensation to the owner. This would be a denial of due process of law under the Fifth Amendment.

We submit that the Court should grant a rehearing and affirm the judgment below.

Dated, Honolulu, Hawaii,
May 2, 1951.

Respectfully submitted,
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*Counsel for Appellees
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ROBERTSON, CASTLE & ANTHONY,
Of Counsel.

CERTIFICATE

I hereby certify that the foregoing petition in my judgment is well founded and that it is not interposed for purposes of delay.

Dated, Honolulu, Hawaii,
May 2, 1951.

J. GARNER ANTHONY,
*Of Counsel for Appellees
and Petitioners.*



IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

L. LESTER MARKS, ELIZABETH LOY
MARKS, and HERBERT M. RICHARDS,
Trustees of the Estate of L. L. MC-
ANDLESS, Deceased,

Appellees.

UPON APPEAL FROM
THE UNITED STATES
DISTRICT COURT
FOR THE TERRI-
TORY OF HAWAII.

**BRIEF OF TERRITORY OF HAWAII,
AS AMICUS CURIAE,
IN SUPPORT OF PETITION FOR
REHEARING**

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MAY 10 1951

PAUL A. O'BRIEN,
CLERK



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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

A. LESTER MARKS, ELIZABETH LOY
MARKS, and HERBERT M. RICHARDS,
Trustees of the Estate of L. L. Mc-
CANDLESS, Deceased,

Appellees.

UPON APPEAL FROM
THE UNITED STATES
DISTRICT COURT
FOR THE TERRI-
TORY OF HAWAII.

**BRIEF OF TERRITORY OF HAWAII,
AS AMICUS CURIAE,
IN SUPPORT OF PETITION FOR
REHEARING**

**INTEREST OF THE AMICUS CURIAE
IN THIS CASE.**

Of the two questions in this case, the Territory of Hawaii is interested only in the second, stated by the Court as follows:

“whether the lands embraced in the leases were subject to withdrawal for national purposes without liability to the lessee.” (Op. pp. 2-3.)

Of the two grounds of decision on this point, the Territory is interested only in the first, stated by the Court on pages 7 to 9 of the opinion (including the first paragraph on page 9 and the second sentence of the second paragraph on page 9). This part of the opinion embraces four conclusions, first, that ceded lands are subject to taking by the

United States under section 91 of the Organic Act, second, that ceded lands, though under lease, still are subject to taking by the United States under section 91 of the Organic Act, third, that the taking of the land under section 91 withdraws it from the management of the Territory, and fourth, that such withdrawal of the land under section 91 automatically frees the land from the encumbrance of a lease already made. With this fourth conclusion the Territory disagrees, because the mere existence of a power of withdrawal of land from the category of public lands for public use does not prevent vested rights from being created before the power is exercised,¹ and because the history and content of the laws governing the Hawaiian lands show the applicability of this principle.²

The Territory submits that under the Hawaiian Organic Act and the land laws of Hawaii approved by Congress,^{2a} vested rights in ceded public lands have been created by instruments hereinafter described, issued by the proper officials of the Territory by authority of Congress; that the instruments creating such vested rights are not necessarily confined to land patents, grants or deeds parting with the fee simple title (compare footnote 13 of the opinion); and that the vested rights so created are good against a subsequent withdrawal of the land from the category of public lands for the use of the United States, entitling the holder thereof to just compensation for the taking thereof by the United States.

While the portion of the opinion argued in this brief does not affect the result in this particular case, since the

¹ The argument on this point appears in Point I, *infra*.

² The argument on this point appears in Point II, *infra*.

^{2a} In this brief reference to the land laws of Hawaii continued in effect by Congress will be by citation of the Civil Laws of 1897. Although the Civil Laws of 1897 were only a compilation, nevertheless as shown in section 1 of the Organic Act (48 U.S.C. 493) Congress acted upon the basis of that compilation. This Court has judicial notice of the laws of Hawaii prior to annexation. *United States v. Fullard-Leo*, 331 U.S. 256, 269.

portion of the opinion interpreting the provisions of the leases here involved in itself would support the result reached,³ nevertheless the matter has a broader aspect. The opinion throws a cloud upon many land transactions entered into in good faith under the supposition that vested rights, good against the United States and everyone else, were being created. That there are grounds for that supposition we believe this brief will show.

In *United States v. Fullard-Leo*, 156 F. 2d 756, 758, affirmed 331 U.S. 256, this Court said that the program of Congress in respect of the ceded public lands was a benign program in which there was "no proper place for advantaging the United States at the expense of the inhabitants on grounds which, though having the semblance of legality, affront the sense of justice." The Territory feels that this quotation is apposite; an inadvertent but nevertheless fundamental disturbance of the Hawaiian land system, in effect since the inception, has occurred in this case, and can only be righted by the rehearing of this case.

Classes of transactions in the ceded public lands deemed by the Territory to create vested rights, good against the United States. The classes of transactions in the ceded public lands falling within the area covered by this brief, and deemed by the Territory to create vested rights good against the United States, in general are those made by a public auction or public drawing, after notice by advertisement.⁴ The Territory deems that the following instruments, in addition to land patents, grants and deeds as to which no dispute has been presented, create vested rights

³ Uncontested by the Territory is the Court's interpretation of the withdrawal clauses embodied in the leases here involved. This second ground of decision in itself upholds this Court's reversal of the court below. But if the petition for rehearing should be granted, holders of leases containing similar withdrawal clauses should not, we submit, be foreclosed from filing briefs as *amici curiae* on this point.

⁴ Footnote on next page.

good against the United States. The reasons for this submitted conclusion are set forth in the argument, *infra*.

1. Homestead leases and agreements for the sale of homesteads,⁵ made by public drawing after advertised notice, or

⁴ Section 73 (i) of the Hawaiian Organic Act (48 U.S.C. 670) requires notice by advertisement for any homestead drawing. While lands may be sold for other than homestead purposes if within the scope of the purposes stated in section 73(1) (48 U.S.C. 673) it likewise is required in case of such sale, by section 73 (i), *supra*, that notice by advertisement be given; pursuant to a provision of section 177 of the Civil Laws of 1897, continued in effect by Congress and still in effect as part of section 4531 of the Revised Laws of Hawaii 1945, such sales must be made at public auction.

The allotment of homesteads by drawing is required by section 73 (i) of the Organic Act (48 U.S.C. 670). However, pursuant to that section, when once offered at a public drawing a homestead may be allotted without another drawing. As to leases, section 73 (d) of the Organic Act (48 U.S.C. 665) relates to fifteen year leases of agricultural lands and requires sale thereof at public auction after notice by advertisement. Section 203 of the Civil Laws of 1897 continued in effect by Congress and now incorporated in section 4544 of the Revised Laws of Hawaii 1945, relates to twenty-one year leases and requires a public auction for the making of such leases. Moreover, section 177 of the Civil Laws of 1897, *supra*, used the broad word "transfer," and required that all transfers of government lands, except under the homestead laws and with other exceptions noted below, be made at public auction after advertised notice. The word "transfers" was, by Act 48 of the laws of 1893-1894, amending section 1 of chapter 44 of the laws of 1876 from which section 177 of the Civil Laws of 1897 was derived, substituted for the words "sales or leases" theretofore used in the section, with the evident intention of covering sales, leases, and every other transfer of an estate or interest in land, except under the homestead laws and with other exceptions noted below.

⁵ The types of homestead leases and agreements appear *infra*, pp. 25-26. These transactions are governed by numerous provisions of the Hawaiian Organic Act and the Civil Laws of 1897, continued in effect by Congress. See Hawaiian Organic Act section 73 (f) - (i) inclusive, 73 (m), (n), and (p), and the last two paragraphs of 73 (q), contained in 48 U.S.C. 667-670, 674-675, 677a, and 677b; Civil Laws of 1897, sections 186, 187, 201, 212-254, continued in effect by Congress and now incorporated in the Revised Laws of Hawaii 1945, sections 4501, 4503, 4565, and Part III of chapter 78. See also footnote 34 as to the repeal of the provisions for 999 year leases, which however does not affect outstanding leases, except that the lessee is entitled to a land patent upon the payment of a fair purchase price.

if once so offered, made without such drawing and notice. These contain no withdrawal clauses but only cancellation clauses related to breaches of terms and conditions. However, in some cases there has been reserved a right of repurchase of a right-of-way at the rate of the original sale price of the lot, plus the value of crops and improvements so taken.

2. Agreements for the sale of lands for purposes within the scope of those stated in section 73 (1) of the Organic Act,⁶ made by public auction after advertised notice. These likewise contain no withdrawal clauses but only cancellation clauses related to breaches of terms and conditions.

3. Leases made by public auction after advertised notice. These are of two types, the first type being non-agricultural leases, which may be made for a term of twenty-one years.⁷ The leases involved in this case were such non-agricultural leases. While in practice such leases usually have contained a withdrawal clause, as did the leases here involved, nevertheless there are a number of instances of twenty-one year leases containing no withdrawal clause. These generally are leases creating rights in the nature of easements, such as rights to develop and carry away water from the water reserves, and rights for pole lines and pipelines. The origin of these easements is the opinion of assistant attorney general Willis Van Devanter, printed as Appendix II. There are outstanding forty-five leases of this kind, conferring rights that sometimes are non-exclusive but nevertheless are for a term of years; such leases contain no reserved right of cancellation for public purposes.

⁶ 48 U.S.C. 673. See also footnote 31 as to the authority for these agreements.

⁷ Section 203 of the Civil Laws of 1897, continued in effect by Congress and now incorporated in section 4544 of the Revised Laws of Hawaii 1945, provides for these leases.

The second type of lease contains withdrawal provisions, but nevertheless is worthy of note. This is the agricultural lease, which may be made for a term of fifteen years.⁸ In this type of lease section 73 (d) of the Organic Act (48 U.S.C. 665) mandates a withdrawal provision "for homestead or public purposes." But it is further provided in said section 73 (d) that the governor, land commissioner, and land board are empowered to omit this withdrawal provision when advantageous to the Territory of Hawaii, in cases of "the lease of any lands suitable for the cultivation of sugar cane." There are outstanding approximately forty-two leases, involving 30,704.27 acres, in which this power of omitting the withdrawal provision has been exercised. But although the printed form of lease, after providing for withdrawal for homestead or public purposes, states that "with the approval of the governor and the board of public lands, *such withdrawal provision*⁹ shall not apply to any lease of any lands suitable for the cultivation of sugar cane," the form for such approval certifies that "the board of public lands of the Territory of Hawaii, pursuant to section 73 of the Hawaiian Organic Act, by and with the approval of the governor of Hawaii, authorized the sale of the foregoing lease *with the withdrawal clause for homesteading*¹⁰ * * * omitted."

4. There are a number of other agreements which, the Territory submits, create vested rights good against the United States. These are authorized to be made without public auction or public drawing. They include, for example, a sales agreement providing for payment of the purchase price in installments, made with the holder of a preference right under section 73 (j) or section 73 (k) of the

⁸ Section 73 (d) of the Organic Act (48 U.S.C. 665) limits this type of lease to fifteen years.

⁹ Italics added.

¹⁰ Italics added.

Organic Act¹¹ or an exchange¹² whereby private lands are conveyed and it is agreed that the public lands given in the exchange will be conveyed at a later date by patent.

Matters outside the area of this brief. Outside of the area of argument here submitted by the Territory are the following matters:

(a) The right of the Territory and its political subdivisions to just compensation for the taking by the United States of the fee simple title to lands owned by them, that is, lands to which the United States does not hold title. (Land owned by the Territory was involved in *City and County of Honolulu v. United States*, No. 12376, decided April 13, 1951.)

(b) The rights of the Territory, its political subdivisions, and their licensees, in the lands set aside by executive order of the governor under section 73 (q) ¹³ of the Hawaiian Organic Act, or in use for wharves and landings, public building sites, parks or the like. Such lands, by definition under section 73 (a) (3), ¹⁴ are not public lands and are not here involved. The licenses here mentioned are, for example, hangar licenses at the public airports, and licenses for oil tanks at or near the public wharves for receiving the oil brought in by tankers. As to the latter, section 106¹⁵ of the Organic Act also has bearing. This category of transactions is not involved in the present case.

(c) The rights of the Territory and the Hawaiian Homes Commission in the Hawaiian home lands designated by section 203¹⁶ of the Hawaiian Homes Commission Act of

¹¹ 48 U.S.C. 671, 672, discussed *infra* pp. 24-25.

¹² Exchanges are governed by section 73 (l) of the Organic Act (48 U.S.C. 673) and by section 178 and part of section 201 of the Civil Laws of 1897, continued in effect by Congress and appearing in the Revised Laws of Hawaii 1945 as sections 4535 and 4534.

¹³ 48 U.S.C. 677.

¹⁴ 48 U.S.C. 663.

¹⁵ 48 U.S.C. 545.

¹⁶ 48 U.S.C. 697.

1920, and the rights of lessees and licensees of such lands under instruments made pursuant to that act.¹⁷ Such lands by the above cited statutory definition are not public lands. Moreover, the Hawaiian Homes Commission Act contains specific provisions as to federal use of such lands, which provisions are not involved here.

ARGUMENT

I.

A LAW OF THE UNITED STATES PROVIDING FOR THE TAKING OF PART OF THE PUBLIC DOMAIN FOR MILITARY OR OTHER FEDERAL USE DOES NOT VITIATE RIGHTS ACQUIRED BEFORE THE LAND ACTUALLY IS WITHDRAWN FROM THE CATEGORY OF PUBLIC LANDS FOR PUBLIC USE, AND IS NOT TO BE READ INTO THE LAW AUTHORIZING SUCH RIGHTS AS A LIMITATION UPON SUCH RIGHTS.

The taking of public lands for public use does not vitiate previously vested rights. The proposition stated in this point is sustained by *Payne v. Central Pacific Ry. Co.*, 255 U.S. 228, 1921, and *Wyoming v. United States*, 255 U.S. 489, 1921.^{17a} These involved laws of Congress in the nature of offers for unilateral contracts which had been accepted by selections in accordance with the terms of the offers, and the contracts thus made were held good and not vitiated by a withdrawal of the land involved by the President, acting under the Act of June 25, 1910, 36 Stat. 847, 43 U.S.C. 141-142, even though the Secretary of the Interior had not yet approved the issuance of a patent. It is noteworthy that this Act of June 25, 1910 contained no clause saving rights perfected under the provisions of law that were involved in the 1921 cases decided in 255 U.S., yet

¹⁷ 48 U.S.C. 691-716.

^{17a} See also *Payne v. New Mexico*, 255 U.S. 367, 1921; *United States v. Midwest Oil Co.*, 236 U.S. 459, 477.

the court did not hold that the Act of June 25, 1910 under which the President acted must be read into the provisions of law under which were perfected the rights involved in the 1921 cases, and the Act of June 25, 1910 was not construed to be a limitation upon those rights. This was true even though in one of these cases (the *Wyoming* case) the rights claimed were perfected after the 1910 act was passed.

The Supreme Court in the 1921 cases distinguished the steps taken by the claimants there involved, who actually had filed their selections, from the mere taking of the initial step toward future compliance with the law (255 U.S. at p. 234). In making this distinction the Court evidently had in mind the cases relating to preemption. These cases held that under the preemption laws an entry upon lands gave only a preference right and that the United States did not, prior to the issuance of its certificate of entry, contract with the settler that the land occupied by him would be put up for sale. *Frisbie v. Whitney*, 9 Wall. 187, 1869; *The Yosemite Valley* case, 15 Wall. 77, 1872; *Russian-American Co. v. United States*, 199 U.S. 570, 1905. Where the entry has been filed before the withdrawal of the land for the use of the United States it is good against the United States. *United States v. Fitzgerald*, 15 Pet. 407. Under this type of statute the certificate of entry constitutes the contract of purchase. *Witherspoon v. Duncan*, 4 Wall. 210, 1866.

There are many types of vested rights; the nature of the particular transaction is determinative. Although, under the preemption laws, the contract is made only after full compliance of the purchaser with all requirements, other types of contracts for the sale of lands may be made by the United States. In *S.R.A. Inc. v. Minnesota*, 327 U.S. 558, 1946, there was involved a bilateral contract, providing for a cash down payment and annual installments. Notwithstanding the major portion of the price remained unpaid, the contract was held to transfer into private hands the

equitable title to land owned by the United States, just as in the cases above cited the unilateral contracts made when the selections were filed or the certificates of entry were issued after full performance by the prospective grantees, were held to transfer the equitable title to land owned by the United States.

A contract right which is vested in the sense of being good against the United States and only terminable by the payment of compensation is not necessarily of such nature as to transfer the equitable title to land. See *Lynch v. United States*, 292 U.S. 571, 1934; *Wilbur v. United States*, 46 F. 2d 217, 221, App. D.C. 1930. Hence the question is whether the particular instrument is one conferring a vested right. This was the approach to the problem taken by this Court in *Osborne v. United States*, 145 F. 2d 892, 1944. The question there involved was the right to compensation for the cancellation of a grazing privilege in the national forests. The land covered by the grazing privilege was withdrawn from all forms of appropriation under the public land laws and reserved for the use of the War Department for military purposes by a Public Land Order made under the authority of Executive Order 9146, 7 Fed. Reg. 3067. Executive Order 9146 was made pursuant to the power vested in the President by the Act of June 25, 1910 *supra* (43 U.S.C. 142); that statute contains no conditions preserving any rights under grazing permits. If a statutory power unconditionally reserved to withdraw land from the category of public lands were enough to dispose of the question of the effect of such withdrawal upon instruments previously issued to private parties, this Court could have disposed of the claim to compensation upon that ground. Instead this Court made no reference to the power of the President to provide for withdrawals of land from the category of public lands, but assuming such power existed, proceeded to dispose of the question of the right to compensation by analyzing the laws and regulations relating to

grazing permits, with a view to determination of the question whether it was the intent thereof to confer a vested right. It was upon the ground that under the statutes and regulations applicable thereto a grazing permit conferred no vested right,¹⁸ and not upon the ground of a previously existing general power to withdraw land from the category of public lands, that this Court determined in the *Osborne* case that there was no right to compensation for the cancellation of the grazing permit.

¹⁸ The reason why the grazing permit involved in the *Osborne* case did not confer a vested right was that the statute relating to grazing upon the public domain specifically stated that grazing permits "shall not create any right, title, interest, or estate in or to the lands." While this statute in terms was not applicable to national forests, there was no statute relating to such permits in national forests, and the practice was to continue the general right of grazing when public lands were transferred to a national forest, subject however to rules and regulations for the preservation of the natural growth. Accordingly, there was no statutory authority for a regulation which purported to say that a grazing permit in a national forest had the force and effect of a contract; the Court therefore held this regulation invalid and concluded that a grazing permit did not "perfect any property right as against the Sovereign."

Cited in footnote 5 of the *Osborne* case were other instances of statutes expressly stating that the permit authorized by the statute should not be held to confer any right, easement or interest. The cases so cited were *United States v. Colorado Power Co.*, 240 F. 217, and *Swendig v. Washington*, 265 U.S. 322, 329. See also the later case of *United States v. San Geronimo Development Co.*, 154 F. 2d 78, (C.A. 1) 1946, a case in which Congress passed a special act authorizing a lease of land in Puerto Rico and in the same act required that the Navy Department have free use of the leased land in time of war or national emergency.

Footnote 5 of the *Osborne* case also cited as instances of permits revocable by the sovereign without compensation, cases of bridge franchises, licenses to erect river and harbor structures, and leases of submerged lands, held to have been issued subject to the requirement that there be no obstruction of navigation or impeding of improvements to navigation. The foregoing were all of the cases cited in said footnote 5 of the *Osborne* case except for a case arising in Alaska, *Berger v. Ohlson*, 120 F. 2d 56, which concerned the ownership of a dock built by the city of Anchorage within the Railroad Terminal Reserve set aside for the Alaska Railroad, a federal instrumentality; the dock was built by the city without any grant or lease of the site and was held not to be owned by the city.

The laws in effect in Hawaii do not resemble those considered in the *Osborne* case and the line of cases cited therein. The Hawaiian laws have some counterpart in the land laws of the United States in the Act of June 1, 1938, 52 Stat. 609, known as the Small Tract Act. The regulations under this Small Tract Act, 43 C.F.R. part 25, show that under this statute contract rights are the first step in an entry upon and occupancy of the public domain, not the last step as under the preemption laws considered in the early cases above cited; leases containing an option to purchase are provided for, and also straight leases.

The types of leases and agreements contemplated by the Hawaiian laws, the history of those laws, and the similarity of the power under section 91 to the above considered power that exists as to public lands elsewhere, whereby (without divesting rights previously acquired) public lands may be withdrawn from the category of public lands for the use of the United States, next will be considered.

II.

BY THE HAWAIIAN ORGANIC ACT AND THE CONTINUATION BY CONGRESS OF THE LAND LAWS OF HAWAII, CONGRESS AUTHORIZED THE CREATION OF VESTED RIGHTS GOOD AGAINST A SUBSEQUENT WITHDRAWAL OF THE LAND FROM THE CATEGORY OF PUBLIC LANDS FOR THE USE OF THE UNITED STATES.

Hawaiian lands are administered by express authority of Congress under special laws substituted for the existing laws of the United States pursuant to the terms of the cession. By the Hawaiian Organic Act Congress left the ceded public lands in the control of the Territory to be administered for its people. Full authority in respect of the management, administration, and disposition of the public lands was committed to the Territory by Congress.

United States v. Fullard-Leo, 156 F. 2d 756, aff'd on other points 331 U.S. 206. By the Organic Act, the Newlands Resolution of July 7, 1898, 30 Stat. 750, and the terms of the cession made by the Republic of Hawaii, a special trust was created under which the Territory, in essence, was the beneficial owner. *United States v. Fullard-Leo*, supra, 156 F. 2d 756, 759, aff'd on other points 331 U.S. 256; 22 Ops. Atty. Gen. 574, 576; 61st Cong. 2d Sess. Sen. Rep. No. 126 and H.R. Rep. No. 910 (Appendix IV).

Whether the instruments made pursuant to the powers conferred by Congress concerning the public lands of Hawaii be viewed as made by the Territory in its own right, as stated by the majority of this Court sitting en banc in the *Fullard-Leo* case (156 F. 2d at p. 760), or be viewed as made by agents of the United States, as stated by the minority of the Court in that case, it has been clear from the inception that such instruments are made (1) by express authority of the Congress,¹⁹ and (2) under a system of land laws continued in effect from the time before annexation and substituted by Congress for the laws governing public lands of the United States, in compliance with the terms of the cession by the Republic of Hawaii and the Newlands Resolution, which required and stated that:

"The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition."²⁰

That instruments relating to the ceded lands are made by express authority of Congress is clear from the fact that

¹⁹ The statement made in the opening brief for the United States in this case (p. 19) that "* * * the Territory possessed the lands at the will of the United States. The Territory could not of course grant the appellees any more than it had." is inexplicable.

²⁰ Resolution of the Senate of the Republic of Hawaii ratifying the Treaty of Annexation of 1897; Newlands Resolution, 30 Stat. 750.

in the interim between the cession and the granting of such authority by the Organic Act all land transactions of the Hawaiian government were void,²¹ 22 Ops. Atty. Gen. 574. This result would not have followed had it been possible for such instruments to issue without their necessarily being binding, if valid at all, on the United States, the holder of the title.

Congress has authorized the Territory to encumber the title of the United States not only by patents but also by leases and other forms of agreement. When the Organic Act was enacted it was provided therein:

“SEC. 73. That the laws of Hawaii relating to public lands, the settlement of boundaries, and the issuance of patents on land-commission awards, except as changed by this Act, shall continue in force until Congress shall otherwise provide.²² That, subject to the

²¹ These transactions subsequently were ratified by section 73 of the Organic Act.

²² The laws continued in effect by this provision (now section 73 (c) of the Organic Act, 48 U.S.C. 664) were contained in the Civil Laws of 1897, as changed by section 7 of the Organic Act (31 Stat. 141, c. 339) and by section 73 itself. But with later amendments of section 73 of the Organic Act extensive detailed provisions were introduced into it which necessarily superseded the early land laws to some extent. All of these changes have been reflected in the provisions of the Civil Laws of 1897 appearing in the Revised Laws of Hawaii 1945 as chapter 78. Hence, upon comparison of the sections of the Revised Laws of Hawaii 1945 with the sections of the land laws continued in effect by Congress from which they are derived, differences will appear. (The section histories in the Revised Laws of Hawaii 1945 give the references to the enactments from which the Civil Laws of 1897 were compiled, but unfortunately do not cite the 1897 compilation itself). Moreover, amendments have been made, and while certain of these amendments have been specifically approved by Congress (see for example Public 582, 80th Cong. 2d Sess. c. 385) they have not always been presented for specific approval, so that questions as to the effect of certain amendments ensue (see *Waiakea Mill Co. v. Vierra*, 35 Haw. 550, 554). However, if the amendments not specifically approved were supposed to be nullities the present case would not be affected thereby and there still would remain many leases and agreements unaffected thereby.

approval of the President, all sales, grants, leases, and other dispositions of the public domain, and agreements concerning the same, and all franchises granted by the Hawaiian government in conformity with the laws of Hawaii, between the seventh day of July, eighteen hundred and ninety-eight, and the twenty-eighth day of September, eighteen hundred and ninety-nine, are hereby ratified and confirmed. In said laws 'land patent' shall be substituted for 'royal patent'; 'commissioner of public lands' for 'minister of the interior', 'agent of public lands', and 'commissioners of public lands', or their equivalents; and the words 'that I am a citizen of the United States', or 'that I have declared my intention to become a citizen of the United States, as required by law', for the words 'that I am a citizen by birth (or naturalization) of the Republic of Hawaii', or 'that I have received letters of denization under the Republic of Hawaii', or 'that I have received a certificate of special right of citizenship from the Republic of Hawaii'. And no lease of agricultural land shall be granted, sold, or renewed by the government of the Territory of Hawaii for a longer period than five years until Congress shall otherwise direct. All funds arising from the sale or lease or other disposal of such lands shall be appropriated by the laws of the government of the Territory of Hawaii and applied to such uses and purposes for the benefit of the inhabitants of the Territory of Hawaii as are consistent with the joint resolution of annexation, approved July seventh, eighteen hundred and ninety-eight: *Provided*, There shall be excepted from the provisions of this section all lands heretofore set apart, or reserved, by Executive order or orders, by the President of the United States." (31 Stat. 141, c. 339, sec. 73 as originally enacted.)

The system thus established early was clarified in correspondence with the Secretary of the Interior and Assistant Attorney General Willis Van Devanter, printed in Appendix I and Appendix II of this brief. See also 24 Ops.

Atty. Gen. 600. These show that it was recognized and intended that officers of the Territory would, under the land laws continued in effect, execute instruments of such a nature as to encumber the title of the United States, and that such instruments were not patents alone, but included leases and other forms of agreements mentioned in the Hawaiian land laws. The opinion in Appendix II took it for granted that leases and sales would create interests in the land involved, and then considered the question whether an easement could be created under the Hawaiian land laws; Assistant Attorney General Van Devanter there advised that an easement could be created, and stated that the word "license" used in the enlarged sense intended by this opinion, included a privilege coupled with an interest, not revocable at the will of the licensor.

Therefore under the Organic Act the power to make leases and sales agreements and other dispositions of land did not rest alone upon the power to "manage," contained in section 91, but more specifically upon the provisions of the land laws which, until it should otherwise provide, Congress continued in effect as constituting the "special laws" substituted for "the existing laws of the United States relative to public lands," as contemplated by the terms of the cession accepted by the Newlands Resolution.

The special laws governing the Hawaiian lands are not affected by the section 91 powers until those powers have been exercised. Congress, in section 73 above quoted, excepted from the operation of the "special laws" only lands "*heretofore* set apart, or reserved, by Executive order or orders, by the President,"²³ which clearly left these special

²³ In later amendments of section 73 this precise provision was dropped, evidently because it was *functus*, but it nevertheless is valuable as showing the construction placed on section 73 by Congress itself. For the present form of this provision see section 73 (a) of the Organic Act as amended, 48 U.S.C. 663.

laws fully operative as to the remaining lands until an actual taking for the use of the United States should occur under section 91, or until Congress should provide other laws under the power so to do reserved by Congress.

Section 91 as originally enacted provided:

“Sec. 91. That the public property ceded and transferred to the United States by the Republic of Hawaii under the joint resolution of annexation, approved July seventh, eighteen hundred and ninety-eight, shall be and remain in the possession, use, and control of the government of the Territory of Hawaii, and shall be maintained, managed, and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or of the governor of Hawaii. And all moneys in the Hawaiian treasury, and all the revenues and other property acquired by the Republic of Hawaii since said cession shall be and remain the property of the Territory of Hawaii.” (32 Stat. 141, c. 339.)

This section was necessary because without it the President would have had no power to reserve additional Hawaiian lands for federal use pending a further act of Congress, 23 Ops. Atty. Gen. 564. The power thus reserved was a power in the President to make exceptions to the general grant of local control over the public lands in order to set apart lands for the needs of the United States; these provisions avoid interference with the general grant of local control. 28 Ops. Atty. Gen. 262, 264, relating to lands in the Philippine Islands. The conception of the Congressional scheme set forth in the cited attorney general's opinion is the opposite of the present Justice Department conception, 'which is that exceptions to the general grant of local control exist before the President makes them. But in *United States v. Fullard-Leo*, *supra*, 156 F. 2d 756 at p. 759, aff'd on other

grounds 331 U.S. 256, this Court held that exceptions to the general grant of local control do not exist until the President makes them. As shown in Point I this is the usual rule, that is, it is the usual rule that a power to withdraw lands from the category of public lands for the use of the United States is ineffective until exercised, and meanwhile the powers as to such lands elsewhere provided continue unaffected by the possibility of such withdrawal, leaving only the question whether rights have vested thereunder before the withdrawal of the lands from the category of public lands for the use of the United States actually occurs.

The history and content of the Hawaiian land laws and Organic Act show that these laws provide for vested rights good against a later reservation of the land for federal use. That under the land laws of Hawaii, continued in effect by Congress, leases and other bilateral agreements were to be made, conferring rights good against a later withdrawal of the land from the category of public lands for the use of the United States, appears from the nature of these instruments and other circumstances, as follows:

1. The Hawaiian land laws themselves provided for the reservation of land for public purposes; this provision was contained in section 186 of the Civil Laws of 1897, continued in effect by Congress as hereinafter explained. Land so reserved was to pass under the control of the then Minister of the Interior, as distinguished from the Commissioners of Public Lands. Section 203 of the Civil Laws of 1897, continued in effect by Congress and now incorporated in section 4544 of the Revised Laws of Hawaii 1945, provided for twenty-one year leases. Section 188 of the Civil Laws of 1897 also concerned leases of public lands, and was continued in effect by Congress and remains in effect as part of section 4543, Revised Laws of Hawaii 1945; it

provided that leases of public lands, with the exception of homestead leases,²⁴ might

“contain a proviso that the Government may at any time with reasonable notice and without compensation, except for improvements taken, take possession of any part of the premises covered by such leases which may be required for laying out and constructing new roads or improving or changing the line or grade of old roads, and take from such premises soil, rock and gravel as may be necessary for the construction or improvement of such roads; provided that such privilege of taking without compensation shall not extend to such parts of such premises as are under cultivation with annual crops or sugar until such crops shall be harvested, nor to such parts of such premises as are planted and cultivated with coffee, fruit trees or other perennial crops, or occupied or improved with permanent improvements, except fences.”

Hence the Hawaiian land laws clearly contemplated that leases would be binding on the lessor and create vested rights except for withdrawal rights expressly reserved in a limited class of cases, and it was not contemplated that a statutory power of withdrawal of lands from the category of public lands for use for public purposes would, without express provision therefor, be read into the lease provisions or limit the rights acquired by the lease. That this was the nature of the Hawaiian leases was recognized when Congress, by the Act of June 28, 1902, authorized the Secretary of War to acquire leases in ceded lands set aside for military purposes, and these leases were purchased. See 25 Ops. Atty. Gen. 225.

It is important to note that section 186 of the Civil Laws of 1897 (as well as sections 188 and 203) was continued in effect by Congress, so that, after giving effect to the changes made by the Organic Act, section 186 appeared in the

²⁴ There was no provision for withdrawal of land from homestead leases or from any type of sales agreement.

Revised Laws of Hawaii 1905 as section 262, the relevant portion of which read as follows:

"All land hereafter reserved by the commissioner [of public lands] for public purposes, shall thereupon at once pass under the control and management of the superintendent of public works."

This provision was superseded when, by the Act of May 27, 1910, 36 Stat. 444, c. 258, section 73 of the Organic Act was amended to provide that the governor,²⁵ not the commissioner of public lands, should make orders reserving land for public use, which provision now is contained in 73 (q) of the Organic Act (48 U.S.C. 677).

Since the predecessor provision, section 186 of the Civil Laws of 1897, was only a provision for the withdrawal of land from the category of public lands and not a provision for its withdrawal from a lease already made, the successor provision, section 73 (q) of the Organic Act, was and is of the same nature, that is, it is a provision for the withdrawal of land from the category of public lands but is not a provision for its withdrawal from a lease already made. However, this Court's opinion assumed to the contrary, stating that appellees had conceded that the Territory, under section 73 (q), was empowered to withdraw leased lands for public purposes of the Territory. (Op. pp. 7-8.) We have read appellees' brief and do not interpret it as so conceding, but if it did so concede, it was erroneous. Section 73 (q), like its predecessor section 186 of the Civil Laws of 1897, has nothing to do with withdrawals from leases, but only section 188 of the Civil Laws of 1897 (now section 4543 of the Revised Laws of Hawaii 1945) and sec-

²⁵ The Committee report on this amendment (61st Cong. 2d Sess. H.R. Rep. 910) states: "Lands assigned to other departments for actual use by those departments or assigned back when no longer needed, are to be assigned by express order of the governor, and thus the status of any public land will always be a matter of certainty. At present it is sometimes difficult under the definitions of the statute to say whether a parcel is under the land or the public works department."

tion 73 (d) of the Organic Act, next considered, have to do with that subject.²⁶

The analysis of the Hawaiian land laws here submitted further supports the proposition above submitted that section 91 is not a provision having to do with withdrawals from leases, and is only a provision having to do with the withdrawal of land from the category of public lands. Since Congress, in continuing the Hawaiian land laws, made a number of amendments thereto, had it intended wider provisions for withdrawal of lands from leases for federal purposes than existed under the Hawaiian land laws for the purposes of the Republic of Hawaii it would have enacted them.

2. The attention of Congress was directed to the problem of the effect of a lease in the event of subsequent withdrawal of the land from the category of public lands for use for public purposes when Congress made its first amendment²⁷ to section 73 of the Organic Act. This concerned the term of an agricultural lease. In the original section 73 Congress had cut this to a five year term until it should otherwise direct. In 1908 the matter of permitting a longer term had the attention of Congress, and Congress then permitted fifteen year terms, subject to the requirement that the lease provide that the land "may at any time during the term of the lease be withdrawn from the operation thereof for homestead or public purposes."²⁸ But Congress

²⁶ Since section 73 (q) of the Organic Act does not, we submit, have to do with withdrawals from leases, the Act of August 21, 1941 amending that section likewise has nothing to do with withdrawals from leases. It may have some bearing on the interpretation of the withdrawal provisions contained in the terms of the leases here involved, with which this brief is not concerned.

²⁷ Act of April 2, 1908, 35 Stat. 56, c. 124.

²⁸ By the Act of July 9, 1921, 42 Stat. 116, c. 42, Congress permitted the omission of the withdrawal provision from the lease of sugar cane lands, as previously noted. The quoted provision, as amended, is now contained in section 73 (d) of the Organic Act (48 U.S.C. 665).

did not go further than to deal with the precise subject before it, which was agricultural leases, so that Congress failed to direct the insertion of a withdrawal provision in other leases.

3. That vested rights superior to a later withdrawal of the lands from the category of public lands were created by the leases made under the Hawaiian land laws, in the absence of an expressly reserved right of withdrawal from the lease, was recognized by the War Department in its report²⁹ on H.R. 11134 which became the Act of June 19, 1930, 46 Stat. 789, c. 546, amending section 91 of the Organic Act (48 U.S.C. 511). The problem there involved arose out of lands being taken from the ceded public lands for military use but subsequently rented by the War Department. The War Department took the position that it could not, if the lands were returned to the Territory, be assured of having them when it needed them, because the land would be placed under a lease by the Territory and could not be withdrawn therefrom. The solution worked out by the 1930 Act was to place the rentals realized by the War Department or realized under like circumstances in other cases, in the territorial treasury which was recognized to be entitled to the income.

4. The foregoing reference to the War Department having rented land set aside for its use suggests that it may have been the practice to take land for federal use as a matter of precaution on the chance that it might be needed for federal use and in advance of actual needs. Express statement of this practice is made in the Committee Report on the 1910 amendments, in the portion of the report concerning the amendments of section 91.³⁰ (These amendments

²⁹ Contained in Sen. Rep. 866, 71st Cong. 2d Sess. The entire Committee Report is printed as Appendix III.

³⁰ This portion of the report, H.R. Rep. 910, 61st Cong. 2d Sess., is printed as Appendix IV. The section amending section 91 of the Organic Act was section 8 of the bill, but as finally enacted was section 7.

provided for the restoration to the Territory by the President of land previously taken for federal use.) That the practice existed of setting land aside in advance of actual federal needs is indicative of the view that the land, if left in territorial management until actually needed, would not be free of the encumbrances placed on it by the Territory under the Hawaiian land laws.

5. That vested rights which are good as against later military needs are created by agreements of sale made under the Hawaiian Organic Act and Hawaiian land laws³¹ was recognized by Congress in enacting the Act of August 7, 1946, 59 Stat., c. 771. The problem there involved is set forth in the committee reports.³² The purpose of this 1946 Act was to prevent forfeitures by purchasers of land whose land later was needed for the prosecution of the war or national defense. The forfeiture against which protection was provided was one which would result from non-performance of building conditions and the like, specified in the terms of purchase; it was assumed by Congress and tacitly recognized to be the law that land purchases were not vitiated by the land being taken over for military pur-

³¹ These agreements of sale are limited to sales for purposes stated in section 73 (l) of the Organic Act (48 U.S.C. 673), unless for homestead purposes or authorized by one of the special provisions previously mentioned relating to preference rights, land exchanges, and the like. Section 201 of the Civil Laws of 1897 provided for the sale of public lands "upon part credit and part cash" under an agreement that could require improvement of the premises and "shall entitle the purchaser to a land patent of the premises upon the due performance of its conditions." These provisions were continued in effect by Congress and now appear in section 4565 of the Revised Laws of Hawaii 1945. The section is headed "special homestead agreements" but as the footnote shows the section also applies to other sales. In the Civil Laws of 1897 the section was not limited to homesteads. The validity of these sales agreements is recognized by Congress in the Act of August 7, 1946 here discussed.

³² H.R. Rep. No. 2462, 79th Cong. 2d Sess. printed as Appendix V, and Sen. Rep. 1762 which is similar. The Act of August 7, 1946 also appears in Appendix V.

poses. This basic assumption was not confined to purchases that had reached fruition in the form of a patent, grant or deed, for agreements specifically were mentioned and protected against forfeiture by reason of non-performance of the terms of the purchase.

In the 1946 Act Congress provided that where the purchaser's non-performance was due to his inability to comply with the terms of the sale during the period of United States occupancy he should be granted an additional period for compliance with such requirements, equal to the period of United States use, whether such use was "under lease or license from the owner thereof or otherwise." Congress specifically provided that this should be an enactment of a continuing nature, applying in any future similar case, hence applicable to any sales agreement.

6. By the Act of July 9, 1921, 42 Stat. 116, c. 42, amendments were made of the preference provision that had been enacted in 1910 to give a preference right of purchase to persons who had resided on a parcel of public lands for ten years and had improved it. These amendments allowed this right of preference to be transferred to other land in case the parcel of land so resided upon and improved was "reserved for public purposes, either for the use of the United States or the Territory of Hawaii."³³ This preference right of purchase (together with a similar preference right contained in section 73(k) of the Organic Act, 48 U.S.C. 672) constitutes the only portion of the laws governing Hawaiian lands that resembles the preemption rights in the laws governing public lands elsewhere.

As held by the early cases relating to public lands of the United States, *supra*, p. 9, preemption rights did not amount to a contract of sale until the land office issued its certificate of entry, which was issued only after the would-be purchaser had made full compliance with all requirements.

³³ Section 73(j) of the Organic Act, 48 U.S.C. 671.

The hardships inherent in laws that contemplated entry, settlement and full performance by the homesteader before he had any contract for the purchase of the land, were recognized by the Act of June 25, 1910, 36 Stat. 847, 43 U.S.C. 142, which provided that withdrawals of land for public use should be subject to valid settlements already made on the land. The Congress thereby established the policy of recognizing, in the event of such a withdrawal for public use, a homestead claim that had not become a vested right. See *Stockley v. United States*, 260 U.S. 532, 544. The 1921 amendments of the Hawaiian Organic Act allowed relief in somewhat similar cases in Hawaii by allowing the preference right to be transferred to other land. Although Congress in 1921 was making a complete revision of section 73 of the Organic Act, no such provision was enacted as to the homestead leases and homestead agreements next considered. None was necessary. In the case of a homestead lease or homestead agreement a homesteader obtained his contract rights before he entered on and improved the land, not afterward.

The homestead leases and homestead agreements provided for by the Organic Act and land laws continued in effect by Congress were of the following nature. After being allotted a tract of land at a public drawing, (1) the homesteader entered under a certificate of occupation entitling him after six years residence on and improvement of the land to a 999 year lease,³⁴ or (2) the homesteader received a right of purchase lease for a term of twenty-one years with an option to purchase entitling him to a land

³⁴ Civil Laws of 1897, sections 216, 219, continued in effect by Congress and appearing in the Revised Laws of Hawaii 1945 as sections 4570 and 4573 but since repealed by the Act of September 1, 1950, Public 746, 81st Cong. 2d Sess., c. 833. The repeal does not affect outstanding leases; however, the 1950 act entitles such a lessee to a land patent upon the payment of a fair purchase price.

patent upon the meeting of all conditions,³⁵ or (3) the homesteader received a cash free home agreement entitling him to a patent at the end of three years upon the meeting of all conditions,³⁶ or (4) the homesteader received a special homestead agreement, entitling him to a land patent upon the meeting of all conditions.³⁷ See also section 73 (h) of the Organic Act (48 U.S.C. 669) as to violations which would cause the land to "resume the status of public land."

On the view here submitted that homestead leases and agreements created vested contract rights good against a subsequent withdrawal of the land from the category of public lands for public purposes of the United States or the Territory, these homesteaders, as distinguished from those who had settled on the land without receiving contract rights, were protected by their contracts and needed no other protection, which explains why no provision enabling them to transfer their claims to another parcel of land was enacted for them.

CONCLUSION

The Territory submits that the petition for rehearing should be granted in order that further consideration may be given by this Court to the structure of laws governing the ceded public lands of Hawaii. In view of the jurisdiction of this Court over such matters, the opinion throws a cloud upon many land transactions entered into in good faith. Upon a more full consideration of the governing laws this cloud will, the Territory believes, be removed.

³⁵ Civil Laws of 1897, sections 245 and 248, continued in effect by Congress and appearing in the Revised Laws of Hawaii 1945 as sections 4597 and 4599.

³⁶ Civil Laws of 1897, section 252, continued in effect by Congress and appearing in the Revised Laws of Hawaii 1945 as section 4601.

³⁷ Civil Laws of 1897, section 201, continued in effect by Congress; the relevant portion appears in the Revised Laws of Hawaii 1945 as section 4565.

For under the laws governing these ceded public lands, homestead leases, agreements for the sale of homesteads, other agreements for the sale or conveyance of lands, and leases containing no express withdrawal provisions, create vested rights good against a subsequent withdrawal of the land from the category of public lands for the use of the United States.

DATED at Honolulu, T. H., this 1st day of May, 1951.

WALTER D. ACKERMAN, JR.
Attorney General of the
Territory of Hawaii

RHODA V. LEWIS
Deputy Attorney General of the
Territory of Hawaii

FRANK W. HUSTACE, JR.
Deputy Attorney General of the
Territory of Hawaii

*On Behalf of the
Territory of Hawaii
As Amicus Curiae*

APPENDICES

(Indexed in the Subject Index)

APPENDIX

APPENDIX I

APPENDIX TO THE REPORT OF THE COMMISSIONER OF PUBLIC LANDS, TERRITORY OF HAWAII, FOR THE YEAR 1900.

“In relation to questions that were raised by the United States District Attorney as to the legality of Hawaiian land transactions since September, 1899, I would beg to submit copies of correspondence and statements that actually took place in regard to the matter, as an appendix to the foregoing report; as follows:

SCHEDULE A

John C. Baird, U. S. Attorney.	DEPARTMENT OF JUSTICE. Office of UNITED STATES ATTORNEY, District of Hawaii.
Hon. Jacob F. Brown, Land Commissioner of Hawaii, City.	

Honolulu, Nov. 5th, 1900.

Dear Sir:—I have the honor to respectfully apply for information from your office concerning the following matters of business relating to public property in the Territory of Hawaii, and originating on and after Sept. 23, 1899, to wit:

Leases of public lands: the names of the lessees and their assignees, if any, descriptions of the lands and acreage leased, and termination of leases; also the dates of the same.

Sales of public lands: the names of the purchasers and their assignees, if any, description of the lands and acreage sold, and dates of deeds, or patents.

Contracts for sales of public lands: The names of the purchasers and their assignees if any, descriptions of the lands and acreage contracted for, and dates of contracts.

Sales or contracts for sale of, or leases of, Water Rights: The names of purchasers, and their assignees, if any, description of water rights, including the name and location of the stream or body of water drawn from, location of the point of division, and quantity of water so disposed of, and the acreage to be irrigated thereby, if known. Also dates of the instruments of conveyance or agreement.

Advertisements of sale or for tenders respecting public lands or water rights now pending.

I trust that it will not seriously inconvenience your office to furnish the information desired.

Yours respectfully,

(Signed.)

JOHN C. BAIRD,
United States Attorney for Hawaii.

COMMISSION OF PUBLIC LANDS,
TERRITORY OF HAWAII,

Honolulu, Nov. 9th, 1900

John C. Baird, Esq.,

United States Attorney for Hawaii.

Dear Sir:

Enclosed please find copies of official correspondence in reference to Public Land matters as follows:

Letter of Governor Dole to the Secretary of Interior, Washington, in reference to Homestead and Right of Purchase Leases, and reply of Thos. Ryan, Esq., Acting Secretary, thereto.

Letter of F. L. Campbell, Acting Secretary of Interior Department to Governor Dole enclosing opinion of Willis Vandevanter, Assistant Attorney General for Interior De-

partment, in re the issuance of Land Patents in the Territory of Hawaii.

I take the liberty to enclose also a statement of the view held in this office of the laws applying to the public lands of the Territory, and under which all recent transactions have been made. A detailed statement of these is well advanced and will be presented to you shortly.

Yours respectfully,

(Signed)

JACOB F. BROWN,
Commissioner of Public Lands,
Territory of Hawaii.

EXECUTIVE CHAMBER,

Territory of Hawaii,

Honolulu, July 10th, 1900.

Honorable E. A. Hitchcock,
Secretary of the Interior,
Washington.

Sir:—

Section 74 of an Act to Provide a Government for the Territory of Hawaii, enacts that "no lease of agricultural land shall be granted, sold or renewed by the government of the Territory of Hawaii, for a longer period than five years, until Congress shall otherwise direct."

I desire instructions whether this provision applied to Homestead Leases and Right of Purchase Leases. The law for Homestead Leases which will be found in the Civil Laws of the Hawaiian Islands, sections 212 to 238 inclusive, provides special proceedings for settling persons on small homesteads. Although the holding is called a lease, it is hardly so in any legal sense, inasmuch as no rent is reserved and the term of the occupation is 999 years; in other words

permanent. It is really a fee to the holder and his heirs, without the right of alienation. To apply the above quoted provision to the homestead lease legislation would render wholly nugatory a most valuable enactment for the settlement of persons on small holdings, which is of particular importance to native Hawaiian and other persons who may have little capital and not a large endowment of thrift.

The Law for Right of Purchase Leases is from section 239 to section 248, of the Civil Law, both inclusive.

The legislation providing for Right of Purchase Leases, establishes a system of land settlement in small holdings, which has been more successful and popular than any of the other methods devised by the Hawaiian Land Act of 1895. The successful applicant receives a lease for 21 years, which fixes the value of the land for the term of the lease, as between the government and the lessee and the performance of certain reasonable conditions of residence and improvement, allows the lessee to acquire a fee simple title by purchase at any time before the last year of the lease. This allows the settler to use his capital at the outset for improvements and cultivation, and to put off the day of purchase until he is well established.

If the provision of the Territorial Act above quoted, applies to Right of Purchase Leases, it renders this system substantially impracticable.

In both of the cases referred to, such a result would seriously interfere with the policy of land settlement in small holdings.

I submit that a reasonable construction of the Territorial Act excludes the application of the provision in question from Homestead leases and Right of Purchase Leases, for these reasons:

1st. The fact that Congress has for the most part continued the Hawaiian Land Laws in force (section 73 and 99) which laws are based largely upon a policy of land set-

tlement in small holdings, militates against a construction that would interfere with such a policy.

2nd. The Congressional discussions of Hawaiian matters showed that the prevailing sentiment of both Houses was in favor of such a land policy, and radically opposed to any legislation that would give corporations an opportunity to acquire lands in fee to any great extent. This being so Congress could not have intended to interrupt the legislation already in existence for land settlement in small holdings.

3rd. The word "lease" used in the provisions referred to, not being connected with the words extending its meaning, must be taken in its ordinary sense, which is a simple lease for a term conditioned upon payment of rent and under which all right of occupation terminates at the expiration of the term.

Yours very respectfully,

(Signed.)

SANFORD B. DOLE.

DEPARTMENT OF THE INTERIOR,
WASHINGTON,

P. and M. Div.

July 27, 1900.

Hon. Sanford B. Dole,
Governor of Hawaii,
Honolulu, Hawaii.

Sir:—

The Department is in receipt of your communication of the 10th instant, desiring instructions as to whether the provision in section 73 of an Act of Congress entitled "An Act to provide a government for the Territory of Hawaii," approved April 30, 1900, "and no lease of agricultural land shall be granted, sold or renewed by the government of the

Territory of Hawaii for a longer period than five years until Congress shall otherwise direct," applies to Homestead Leases and Right of Purchase Leases.

Said Section 73 provides:

That the laws of Hawaii relating to public lands, the settlement of boundaries, and the issuance of patents on land-commission awards, except as changed by this act, shall continue in force until Congress shall otherwise provide.

An examination of the laws of Hawaii in connection with the provision of the Territorial act referred to by you leads to the conclusion that your opinion that it was not intended that said provision should apply to Homestead Leases or Right of Purchase Leases is justified. The Homestead being for nine hundred and ninety-nine years and reserving no rent is, as you say, in effect the conveyance of the fee and is given after compliance with certain requirements as to residence upon and improvement and cultivation of the land very similar to the requirements of the homestead law in force in other parts of the United States.

The so-called Right of Purchase lease is a part of the proceedings in another method for the acquisition of public lands. It was evidently not intended to change the existing provisions of the Hawaiian law by which title the public lands may be acquired, but it was the intention to continue those provisions in force for the present, at least.

You are therefore instructed that the provisions of the Territorial act referred to does not apply to Homestead Leases or Right of Purchase Leases.

Very respectfully,

(Signed.)

THOS. RYAN,
Acting Secretary.

EXECUTIVE CHAMBER,

Territory of Hawaii,

August 21st, 1900.

The Honorable

E. A. Hitchcock,

Secretary of the Interior,

Washington.

Sir:—

Some doubt exists in my mind as to the execution of land patents and other instruments for the disposition of public lands.

Our land laws as amended by the Territorial Act, provide that land patents shall be signed by the governor and countersigned by the Commissioner of Public Lands and that the said commissioner may make leases.

These provisions of law are supposedly in force under section 73 of the Territorial Act. Section 458 of the Revised Statutes of the United States, 2nd edition 1878, provides that patents issuing from the General Land Office shall be issued in the name of the United States and be signed by the President and countersigned by the Recorder of the General Land Office. Sections 450 and 451 of the Revised Statutes, same edition, authorize the President with the advice and consent of the Senate, to appoint a secretary and assistant secretary, "whose duty it shall be under the direction of the president to sign in his name and for him patents for land sold or granted under the authority of the United States."

Does this provision bear upon the execution of land patents under the laws of the Territory of Hawaii, or shall I proceed in such matters under the provisions of our laws, regardless of these provisions of the Revised Statutes?

Very respectfully,

(Signed.)

SANFORD B. DOLE.

DEPARTMENT OF THE INTERIOR.

Washington,

October 24, 1900.

The Governor of Hawaii,
Honolulu, H. I.

Sir:—

Your letter has been received, in which, after referring to the provisions of Section 450, 451 and 458 of the Revised Statutes of the United States, relative to the issuing of Land Patents, you inquire as to whether these provisions govern in the executions of Land Patents under the laws of the Territory of Hawaii.

In response thereto, I transmit herewith for your information a copy of an opinion of the Assistant Attorney General for the Interior Department to whom the matter was referred, in whose conclusion that, for the present, the existing laws of the Territory of Hawaii govern the execution of Land Patents, I concur.

Very respectfully,

(Signed.)

3338,
2864.

F. L. CAMPBELL,
Acting Secretary.

2864-1900

P. and M. Div.

DEPARTMENT OF THE INTERIOR.

Office of the Assistant Attorney-General,

Washington, October 16, 1900.

The Secretary of the Interior,

Sir:—

I am in receipt by your reference with request for an opinion upon the question presented therein, of a letter from the Governor of Hawaii in which, after referring to the provisions of the Revised Statutes (Secs. 450, 451, and 458), relating to the issuing of land patents, he says:

Does this provision bear upon the execution of land patents under the laws of the Territory of Hawaii, or shall I proceed in such matters under the provisions of our laws regardless of these provisions of the Revised Statutes?

Said sections provide in substance that the President may appoint a secretary to sign his name to patents for land sold or granted under authority of the United States and that all patents issuing from the General Land Office shall be issued in the name of the United States and be signed by the President and countersigned by the Recorder of the General Land Office.

The Joint Resolution of July 7, 1898 (30 Stat., 750), accepting the cession of the Hawaiian Islands provides as to the public lands as follows:

The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition.

Provision was made for the government of the Territory of Hawaii by the Act of April 30, 1900 (31 Stat., 141). By section 73 of that Act it is provided:

That the laws of Hawaii relating to public lands, a settlement of boundaries, and the issuance of patents on land-commission awards, except as changed by this Act, shall con-

tinue in force until Congress shall otherwise provide. . . . In said laws "land patent" shall be substituted for "royal patent"; "commissioner of public lands" for "minister of the interior," "Agent of public lands," and "commissioners of public lands" or their equivalents.

Section 9 of said Act provides:

That wherever the words President of the Republic of Hawaii or Republic of Hawaii, or Government of the Republic of Hawaii, or their equivalents, occur in the laws of Hawaii, not repealed by this Act, they are hereby amended to read "Governor of the Territory of Hawaii," or "Territory of Hawaii," or "Government of the Territory of Hawaii" or their equivalents as the context requires.

Provisions as to the preparation, execution and issuance "Royal Patents" and "Land Patents" are found in sections 171, 172 and 200 of the laws of Hawaii (1897) none of which sections is found in the list of Acts, Chapters and Sections of the laws of Hawaii, specifically repealed by said Act of Congress of April 30, 1900, *Supra*.

These sections are changed by the substitution and amendments made by the Act of Congress are in force and are to remain in force until Congress shall otherwise provide. Thus a system differing from that provided by the Revised Statutes is for the present provided for the Territory of Hawaii. The provisions thus made applicable to this Territory must control.

The paper submitted is herewith returned.

Very respectfully,

(Signed.)

WILLIS VAN DEVANTER,
Assistant Attorney General.

Department of the Interior, October 16, 1900.

Approved.

(Signed.)

F. L. CAMPBELL,
Acting Secretary.

COMMISSION OF PUBLIC LANDS.

The Joint Resolution of Annexation approved July 7th, 1898, provided that "the existing laws of the United States relative to Public Lands shall not apply to such lands in the Hawaiian Islands, but the Congress of the United States shall enact special laws for their management and disposition."

Until Congress should enact such laws, no power existed in their local government to alienate or change the status of the Public Lands in Hawaii, and although under a misunderstanding of the purport of this clause of the resolution, certain transactions in public lands were made before Congress had enacted these special laws, such transactions were annulled by President McKinley under date of September 11th, 1898, upon the opinion of the Attorney General of the United States that such transactions were without warrant of law.

Congress has since, however, enacted the special laws required by the resolution of annexation, and by "An Act to Provide a Government for the Territory of Hawaii," approved April 3rd, 1900, has specifically enacted by Section 73 of said Act "that the laws of Hawaii relating to public lands, the settlements of boundaries and the issuance of patents on land commission awards, except as changed by this Act, shall continue in force until Congress shall otherwise provide": and such intended continuance is emphasized by the changes made to adapt such laws to the new conditions after the taking effect of the Act.

The continuance of the Land Laws of Hawaii by the Organic Act of April 3rd, 1900, could not, however, affect those transactions that had been annulled as aforesaid, and an additional clause therefore appears in the said Section 73 ratifying and confirming, subject to the approval of the President, all sales, grants, leases and other dispositions of

the public domain and agreements concerning the same, and all franchises granted by the Hawaiian Government in conformity with the laws of Hawaii between the seventh day of July, 1898, and the twenty eighth day of September, 1899.

It has been suggested that the continuance of the laws of Hawaii as enacted in Section 73 has reference only to those transactions between July 7th, 1898 and September 28th, 1899, but this appears to this office wholly untenable for the following reasons:

If any such limitation of the law was intended, such intention would certainly and easily have been stated, rather than the clear and unmodified statement that the existing laws should remain in force until Congress should otherwise provide.

The changes made in the Laws of Hawaii by Section 73 are meaningless and useless as limited to those transactions between July 7th, 1898, and September 28th, 1899.

The provision that no lease of agricultural land shall be made for longer period than five years is useless in reference to the transactions between those dates. Those transactions are fully ratified and confirmed by Congress subject only to the President's approval: the amendment as to the five year lease has value only as applied to new transactions.

Of still greater significance, however, is the change in the laws made by Section 73 in substituting the words "I am a citizen of the United States" or "that I have declared my intention to become a citizen of the United States, as required by law" for the words, "that I am a citizen by birth (or naturalization) of the Republic of Hawaii," etc.

This change is absolutely unnecessary as applying to any old transactions, for these words are used only in the original applications for lands under the various systems. What is the meaning of this change in connection with lands not only applied for months before, but sold, granted and leased

already and which sales, grants and leases Congress ratifies and confirms, subject only to approval of the President? This change evidently is made with reference to the transactions that should ensue after the passage of the Territorial Act. In brief, the changes in the laws provided by Section 73 are necessary only in case the land laws of Hawaii were continued in force for the disposition of new lands.

They are superfluous, meaningless and misleading as limited to the transactions from July 7th, 1898 to September 28th, 1899.

No one questions that the title to the public lands of this Territory is in the United States and probably no one questions that Congress may make such disposition of those lands as it sees fit. It has, by Section 99, definitely asserted the title to the lands known as Crown Lands and makes the same "subject to alienation and other uses as provided by law."

Such law has been provided by Section 73 which, making certain changes to adapt existing laws to new conditions, thereupon continues the existing laws until Congress shall otherwise provide. These laws are full and explicit. They cover the case of each and every transaction since the passage of the Act, and are understood by this office to be the clear statement of the methods by which Congress has for the present chosen to dispose of Public lands in Hawaii.

It is claimed that as the title to these lands is in the United States, and no formal cession has been made back to the Territory of Hawaii, that the local authorities are powerless to dispose of any portion of the same. Without assuming to discuss the technical points that might be raised in this connection, I would submit that it is not held by this office, that these lands are the property of the Territory to be disposed of under local laws. It is held that they are lands of the United States to be disposed of as Congress has directed and shall direct—in other words, that the existing

land laws are not the local laws of the Territory of Hawaii, but special laws of the United States Congress applying to the Public lands in said Territory: and that Congress in explicitly continuing these laws practically re-enacted them and all their provisions as laws of the United States, subject to the modifications and changes that had been deemed necessary.

Section 91 of the Organic Act, commits to the possession, use and control of the Government of the Territory of Hawaii, to be maintained, managed and cared for at the expense of the Territory, until otherwise provided by Congress, "the public property ceded and transferred to the United States by the Republic of Hawaii under the joint resolution of Annexation approved July 7th, 1898.

The above is a general enactment covering numerous classes of property ceded under the joint resolution, and is subject to special enactment in regard to any particular class or portion of the property. Congress has "otherwise provided" for the disposition of the Public Lands of the Territory by Section 73, by the same section reserving to itself the right of any further provisions.

The enclosed correspondence from the Department of Interior, Washington, appear in strong confirmation of the views stated above.

The opinion of Mr. Vandevanter, Assistant Attorney General for the Department of the Interior, is in effect, that Section 73 of the Organic Act continues to local authorities the power to issue Land Patents for the Public Lands of this Territory.

If this important authority is so continued, it appears reasonable to suppose that all the provisions of the laws of Hawaii relating to public lands are continued, with the modifications and changes made by Congress, in full force and effect until Congress shall otherwise provide.

In endorsing the view of Governor Dole in the matter of

Homestead and Right of Purchase Leases, Mr. Ryan, Acting Secretary, very directly states: "It was evidently not intended to change the existing provisions of the Hawaiian Laws by which title to the Public Lands may be acquired, but it was the intention to continue those provisions in force for the present at least."

Consideration of the original report of the Commission appointed to formulate an Act for the Government of the Territory of Hawaii, of Senate and House discussions, and the evidence of parties present at the hearing in committee pending the passage of the Organic Act, leaves, in the opinion of the undersigned, no doubt of the intention of Congress in this matter, which intention it is believed, is clearly expressed in the Act approved April 3rd, 1900, and to which it has been the purpose of this office to conform.

I have the honor to be

Yours very respectfully,

JACOB F. BROWN,
Commissioner of Public Lands,

Nov. 9th, 1900.

Territory of Hawaii.

John C. Baird, Esq.,

United States Attorney for Hawaii.

COMMISSION OF PUBLIC LANDS.

Honolulu, H. T.,

November 12th, 1900.

John C. Baird, Esq.,

U. S. Attorney for Hawaii.

Dear Sir:—

In reply to the request for information contained in your communication of November 5th, I beg to submit the following statements.

You will note that after the date of September 28th, 1899, no transactions are recorded until after June 14th, 1900, the date of the taking effect of the Act to provide a Government for the Territory of Hawaii, as approved April 30th, 1900.

Understanding your request to apply only to transactions originating on or after September 28th, 1899, I have not included transactions in continuance or completion of any contracts, agreements, or dispositions of Public lands originating before such date.

For your further information in this matter, I beg to call your attention to the fact that there is a class of Public land not within the control or management of this office.

This class of lands is referred to in Section 186 of "Civil Laws," as follows:

"Provided, however, that this Act shall not apply to the following classes and descriptions of land, the property of the Government, all of which shall remain under the control and management of the Minister of the Interior.

"Town lots, sites of public buildings, land used for public purposes, roads, streets, landings, nurseries, tracts reserved for forest growth, and conservation of water supply, parks and all lands which may hereafter be used for public purposes. All lands hereafter reserved by the Commissioners for public purposes, shall thereupon at once pass under the control and management of the Minister of the Interior."

By the Act to organize the Government of the Territory of Hawaii, the duties of the "Minister of the Interior" in this connection, devolve upon the Superintendent of Public Works and information as to transactions on the class of lands referred to should be obtained from the office of Public Works, this office not having official knowledge of such transactions.

PUBLIC LANDS NOTICE. OLAA TRACT, PUNA, HAWAII.

[Terms of the notice omitted.]

OLAA SALE.

[List of 86 lots sold at this sale omitted.]

The foregoing sales in Olaa, Puna, Hawaii, were made in accordance with Sec. 201 of "Civil Laws," at public auction in Hilo, Hawaii, Sept. 20th, 1900, on the terms and conditions set forth in printed notice enclosed.

The land was sold in lots of about 50 acres each, and is covered with heavy forest and jungle growth characteristic of the wet districts of Hawaii, being suitable, after clearing, to cultivation of coffee, sugar-cane, citrus fruits and general products.

The amount thus sold, about 4000 acres, is portion of a large tract having the same general qualities and a total area of about twenty thousand acres which has all been carefully surveyed and upon which an expenditure for surveys and the building of roads has been made by the local authorities to the amount of thirty or forty thousand dollars.

These lands are connected by good roads with the town of Hilo, and lie from ten to twenty miles from same.

The accompanying list of purchasers was prepared immediately after the sale and is presumably complete.

The agreements of sale to be made with purchasers for these lots, have not yet been executed but are in process of execution in the Sub-Agent's office in Hilo, to be presented at this office for signature.

SPECIAL AGREEMENT.

Date of Agreement	Purchaser	Area	Location	Purchase Price
Aug. 1, 1900	James D. Dole	61 Acres	Lot 10, Wahiawa Waialua, Oahu	\$4,000.00

The above agreement of sale was made under Section 201 of "Civil Laws," the land concerned having been sold

at public auction in Honolulu, July 28th, 1900, for the purchase above.

This lot is agricultural land about 20 miles from Honolulu, at an elevation of about 1200 feet. It is open land suited to general farming purposes and was sold under conditions as follows:

One-fifth of the purchase price cash, the remainder in four equal installments. Purchaser to maintain his home continuously on the premises from the end of first to end of fourth year of agreement.

Twenty-five per cent of the land to be put under bona-fide cultivation by end of fourth year.

The above conditions are embodied in the agreement of sale duly issued and noted above.

CASH SALE.

Date of Sale	Purchaser	Area	Location	Purchase Price
Oct. 22, 1900	Mrs. S. C. Allen	50 Acres	Ewa, Oahu	\$315.00

The land concerned above is a small lot of swampy land, portion of old fish pond on the line of Oahu railway about 10 miles from Honolulu.

No Land Patent or deed for above lot has yet been issued.

GENERAL LEASES.

Date of Lease	No.	Lessee	Term	Area	Location	Annual Rental
Sept. 1, 1900	528	A. Enos & Co.	5 yrs.	25,000 Acres	Kahikinui, Maui	\$3,010.00

The above lease was made upon sale at auction, September 1st, 1900, after 30 days' public notice. The lease is for term of five years from Feb. 1st, 1901, expiring Feb. 1st, 1906.

This tract of land estimated at 25,000 acres, covers the arid and almost waterless lands of the Kahikinui district, Maui. A large portion of this land is represented by absolutely barren lava flows. It has, however, a reasonable amount of pasture in favorable seasons and brackish water

is obtained at the coast. This Kahikinui district appears practically devoid of agricultural possibilities, but the lease provides for the taking up of any land without reduction in rent, if the same is desired for settlement.

Lease further requires an annual expenditure of \$200 in eradicating lantana from the land.

The rental obtained is considered by this office a good one.

GRANT OF RIGHT OF WAY.

Date	Grantee	Location	Annual Fee
Nov. 1, 1900	Theo. F. Lansing	Waiahole, Oahu	\$10.00

The above is a grant of right of way for a pipe line for conveyance of water across public land at Waiahole, Koolau, Oahu, and between certain lands owned by the grantee. This right of way is granted for thirty years at an annual fee of Ten Dollars in accord with intent and purpose of "An Act to regulate the acquisition of Right of Way over the lands of others," approved August 13th, 1895. (See Civil Laws) Chapter 114, and is for right of way only, not conferring any water rights.

WATER RIGHTS.

No leases, sales or contracts have been completed with reference to any water rights since the date of September 28th, 1899.

A lengthy consideration has been given, however, to the joint application of the Waialua Agricultural Co. and the Hawaiian Fruit and Plant Co., to enter upon certain Public land in Waialua district for the purpose of constructing dams, reservoirs, flumes, etc., for the utilization of lands of those companies lying below. The matter is somewhat complicated and difficult of clear explanation, but is substantially as follows:

[Explanation of this matter omitted.]

The foregoing is a full statement of the transactions of this office September 28th, 1899, to date, other than the usual routine work of the office and such transactions as applied to matters originating before that date.

I remain,

Very respectfully,

J. F. BROWN,
Commissioner of Public Lands,
Territory of Hawaii.

John C. Baird,
U. S. Attorney.

Department of Justice.
Office of
United States Attorney,
District of Hawaii.

J. F. Brown, Esq.,
Commissioner of Public Lands,
Honolulu, Hawaii.

Honolulu, Nov. 12, 1900.

Dear Sir:—

I beg to acknowledge receipt of your letter of this date inclosing statement requested by my letter of the 5th inst. and covering "the transactions of this (your) office from September 28, 1899, to date, other than the usual routine work of the office and such transactions as applied to matters originating before that date."

Thanking you very kindly for your courtesy in the premises, I remain,

Yours very respectfully,

(Signed.)

JOHN C. BAIRD.

SCHEDULE B

EXECUTIVE CHAMBER.

Honolulu, November 9th, 1900.

The Honorable E. A. Hitchcock,
Secretary of the Interior,
Washington, D. C.

Sir:—

Mr. J. F. Brown, Commissioner of Public Lands, informs me that Mr. Baird, District Attorney at the Federal Court of the Territory of Hawaii, has recently told him that he has been instructed to enquire into the legality of Hawaiian land transactions since September, 1899, with authority to contest their validity, and that he is of the opinion that there is no authority in the Territorial Government to sell public lands.

Upon the going into effect of the "Act to provide a government for the Territory of Hawaii," on the 14th of June last, with the provisions contained in sections 73 and 91 of the same relating to the Hawaiian public lands, I supposed that authority was thereby conferred upon the Territorial Government to dispose of public lands in the Territory under the provisions of the "Laws of Hawaii relating to Public Lands."

The limitations of leases of agricultural lands to terms of five years as provided in said section 73, raised a doubt in my mind as to Homestead Leases and Rights of Purchase Leases, whether such limitation applied to them, and I wrote you for instructions in the matter July 10th. Your letter, dated July 27th, was duly received by me. This letter stated that such limitation does not apply to Homestead Leases and Right of Purchase Leases, and explains that "it was evidently not intended to change the existing provisions of the Hawaiian law by which title to the public lands may be acquired, but it was the intention to continue those provisions for the present at least."

With this letter, together with the provisions of the Organic Act referred to, my mind was clear as to the authority of this Government to act under the Hawaiian laws and the Territorial Act in the matter of land transactions, and the Commissioner of Public Lands was instructed to proceed with the work of his department.

Mr. Brown has taken up the work of furnishing land to settlers in several directions, and has in Oloo, Hawaii, disposed of a considerable number of holdings upon conditions of time payment, residence and improvement. These intending settlers would be much prejudiced if their interests already acquired in these holdings should be set aside as invalid, or even if doubt and uncertainty should be thrown upon them by litigation.

There is a considerable demand for lands for settlement purposes from Hawaiians, Portuguese and Americans and probably from persons of other nationalities, and it seems important from a public standpoint that the work of furnishing such persons with homesteads should not again be brought to a standstill.

I need hardly call your attention to the embarrassment which such action would cause the Territorial Government by making it appear either that it does not understand its duties or is not anxious to keep within its authority.

I have the honor to be, Sir,

Very respectfully,

(Signed.)

SANFORD B. DOLE.

DEPARTMENT OF THE INTERIOR.

Washington,

W. V. D.

December 10, 1900.

The Governor of Hawaii.

Sir:—

Referring to your letter of this 13th ultimo, enclosing a statement by the Commissioner of Public Lands of his views

respecting the authority of the Hawaiian officers over the public lands in Hawaii, I transmit herewith a copy of a letter of the 4th instant, to the Attorney General, from the Assistant Attorney General assigned to this Department, which expresses the views of the Assistant Attorney General upon the question discussed by the Commissioner of Public Lands in the statement above named. The views of the Assistant Attorney General were reached after a consideration of the statement prepared by the Commissioner of Public Lands and of a like statement, but reaching a different conclusion, prepared by the United States Attorney for the District of Hawaii.

The views of the Assistant Attorney General, as expressed in his letter of the 4th instant, have my approval.

Very respectfully,

(Signed.)

E. A. HITCHCOCK,

Secretary.

DEPARTMENT OF THE INTERIOR

Office of the Attorney General,
Washington,

December 4, 1900.

The Attorney-General.

Sir:—

Answering your letter of the 3rd instant, enclosing a letter of the ultimo from the United States Attorney for the District of Hawaii, together with a brief prepared by him and copies of correspondence, all relative to the authority of the public officers of the Territory of Hawaii to sell, lease or otherwise dispose of public lands in the Hawaiian Islands, I have read the enclosures named, but I do not agree with the United States Attorney in his conclusion that the public officers of the Territory of Hawaii are not authorized to sell, lease or otherwise dispose of public lands in the Hawaiian Islands. While the grant of

authority could have been more plainly stated, it seems to me that the question is free from difficulty, and that subject to certain specified changes and amendments the Act of April 30, 1900 (31 Stat., 141), continues in force "the laws of Hawaii relating to public lands, and thereby provides a system whereby the public lands in those islands may be disposed of until Congress shall otherwise provide." These public lands are not granted to the Territory, but Congress in the exercise of its power and discretion has made the Hawaiian officers and Hawaiian laws, subject to the changes and amendments specified, its instruments for the time being for the disposal of these lands.

In your letter to me it is said "he (United States Attorney) seems to have come to a conclusion opposed to that in your report of July 10, 1900, to the Secretary of the Interior."

There was no report, letter or opinion from me upon this subject at or about the time named, but I find a letter from Acting Secretary Ryan to the Governor of Hawaii, dated July 27th last, and an opinion from myself to the Secretary of the Interior, dated October 16th last, both of which may be said to be opposed to the general views expressed by the United States Attorney for Hawaii.

If this communication does not answer the purpose intended to be effected by your letter to me, I will be glad to await your further direction in the premises.

Herewith are the papers accompanying your letter.

Very respectfully,

WILLIS VAN DEVANTER,
Assistant Attorney General.

EDWARD S. BOYD,
Secretary of the Commission of Public Lands.

APPENDIX II

OPINION LETTER OF THE ASSISTANT ATTORNEY GENERAL TO THE SECRETARY OF THE INTERIOR AND LETTER FROM THE SECRETARY OF THE INTERIOR TO THE GOVERNOR OF THE TERRITORY OF HAWAII APPEARING IN THE REPORT OF THE COMMISSIONER OF PUBLIC LANDS FOR THE YEAR 1902.

Department of the Interior,
Office of the Assistant Attorney-General,
Washington, April 4th, 1902.

The Secretary of the Interior.

Sir:—

You have referred to me, for consideration and appropriate action, the application of James Walter Jones of Honolulu, Hawaii, made to the officers of the Territory of Hawaii, if granted by them, would create an easement upon a portion of the public lands in said Territory, coupled with a right to take from adjacent lands during the existence of the easement, earth, rock and timber—the easement and right to be used for the purpose of constructing, and operating all the works necessary to supply water for irrigating lands, developing power, and for domestic purpose.

The applicant proposes to pay to the Territory, as compensation for the granting of the easement sought, a yearly sum ranging from \$1,000 to \$2,500, and further proposes to furnish and sell water for domestic and agricultural purposes to those who are acquiring or leasing public lands and to owners of private lands, the rates therefor to be uniform and to record to certain specified standards.

It seems that the officers of the Territory are willing, and deem it advisable for the best interests of the Territory, to grant the application, but have withheld final action pending consideration.

Two questions are presented for consideration: (1) Have the Territorial officers power to grant an easement upon and over Public Lands of the Territory for the purposes named in the application, and if so, may they authorize the grantee thereof to take from adjacent land during the life of the easement, earth, rock and timber, the same to be used in the construction, maintenance and repair of the improvements to be erected, (2) Is it necessary for this Department to approve the application?

By the joint resolution of July 7, 1898 (30 Stat. 750), accepting the cession of the Hawaiian Islands, it is provided that:—

The existing laws of the United States relative to Public Lands shall not apply to such lands in the Hawaiian Islands, but the Congress of the United States shall enact special laws for their management and disposition.

Section 73 of the Act of April 30, 1900 (31 Stat. 141, 154), providing a Government for the Territory of Hawaii, continued in force with certain modifications to conform to changed conditions, the laws of Hawaii relating to Public Lands which were in existence at the date of the passage of the aforesaid joint resolution. Among the provisions thus modified and continued in force are the following, being a part of sections 169 and 193 and subdivision of section 186 of the Civil Laws of Hawaii, of 1897:—

Section 169. The Commissioner of Public Lands, by and with the authority of the Governor and Attorney-General, shall have power to lease, sell or otherwise dispose of the Public Lands, and other property, in such manner as he may deem best for the protection of agriculture, and the general welfare of the Territory, subject, however, to such restrictions as may, from time to time, be expressly provided by law.

Sect. 186. Sub. 6. A "land license" means a privilege granted the Territory for the occupation of land for cer-

tain special purposes, such as the cutting and removal of timber, the removal of soil, sand, gravel or stone.

Sec. 193. The Commission of Public Lands have power from time to time to establish forms of all instruments necessary for carrying out this Act,...and to make, alter and revoke rules and regulations....for the granting of land licenses, etc.

The above are the only provisions of the laws of said Territory under which it may be claimed that the power to grant the authority requested exists. So far as I am informed these statutory provisions have not received judicial interpretation, but it has been shown that, prior to the establishment of the Provisional Government of Hawaii, the officers of the Kingdom, charged with the administration of the Public Land laws, and under provisions similar to the above, granted applications of the character under consideration. Further, that the executive officers of the Republic, under the aforesaid provisions, have heretofore claimed and exercised the same power, and that since annexation the Territorial officers have granted similar applications. The construction thus given to said provisions, and to provisions of similar import, is entitled to respectful consideration, and should not be disregarded without good reasons. *United States v. Moore* (95 U.S., 760, 763).

In determining the extent of the power intended to be conferred upon the officers named in said section 169, two questions are presented for consideration, viz. (1) Will the establishment of works to supply water for irrigation, power, and domestic purposes in the Hawaiian Islands protect agriculture therein, or conduce to the general welfare of the Territory? (2) Is the power to grant an easement included within the power given to lease, sell, or otherwise dispose of the public lands?

It is well known that a large part of the Islands is arid or semi-arid, and incapable of cultivation without irriga-

tion. The histories of other countries, and the development of our own, demonstrate that the establishment, maintenance, and operation of irrigation works in arid and semi-arid regions promote and protect agriculture and enhance the general welfare of the state. This fact has long been recognized by Congress and by the people of the Rocky Mountain region and Pacific Slope, as is evidenced by Constitutional provisions adopted, and Congressional, State, and Territorial legislation enacted, to promote, encourage, and protect irrigation enterprises; it has been recognized by the courts, as will appear by reference to judicial approval, construction, and application of such laws; it has been recognized by the law making power of Hawaii, as will be seen in its laws relative to the exercise of the right of eminent domain, where power is conferred to take private property for the purpose of "constructing dams, reservoirs, canals, ditches, flumes," etc.

It is now universally conceded that an enterprise which has for its object and purpose, and which is calculated to reclaim from their desert character and bring under cultivation, lands situated in an arid or semi-arid region, is an enterprise that promotes agriculture and adds to the wealth of the community; and it has been too long, and is now too well settled, by high judicial authority, to admit of discussion, that water works used for developing power or for supplying water for domestic purposes are for the benefit of the public. It follows that, under said section 169, the officers therein named are given the power to lease, sell, or otherwise dispose of Public Lands for the construction, maintenance, and operation of such works as are mentioned in the application.

The power to encumber the Public Lands by the granting of an easement, while not in specific terms given by the section, is clearly included in the words employed. As is plainly evident, the purpose of the section is to protect and

promote important and beneficial public objects, and should be construed liberally in favor of the public interests, if this can be done without violence to its terms, (Sutherland, Stat. Sec. 443). Applying this well settled rule of statutory, construction to the words employed, there can be no doubt that the legislature intended to confer the minor power of granting an easement when it invested the officers of the Territory with authority *to lease or otherwise dispose* thereof. This view of the meaning of the words employed is strengthened by judicial decisions (as will be seen by reference thereto) wherein are construed terms of similar import in the Federal Constitution and in Act of Congress.

Art. 4, Sec. 3, of the Federal Constitution provides:—

That Congress shall have power to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States.

In passing upon this provision the Supreme Court, in *U. S. v. Gratiot et al* (14 Det., 526, 537), held that it authorized Congress to enact laws for the leasing of the public domain.

By Act of March 3, 1819 (3 Stat., 520), the Secretary of War was authorized under the direction of the President, to cause to be sold certain military sites. By a subsequent Act, passed April 28, 1828 (4 Stat., 264), the President was authorized to sell certain lands which had been conveyed to the Government for forts, arsenals, dockyards, lighthouses, or any like purpose, etc.

In November, 1838, the Secretary of War entered into a contract with the President of the Baltimore and Ohio Railroad Co., by the terms of which authority, for an indefinite period, was granted to the company, among other things, to construct its railroad over and across lands of the Government included in the site of Harper's Ferry Military Arsenal. Under said agreement the company en-

tered upon and constructed its line of railroad over and across said lands, and operated said railroad continuously thereafter. Subsequently an action was instituted by the Government against the company to cancel the aforesaid agreement, principally upon the ground of want of power in the Secretary of War to enter into the same. The court dismissed the bill, holding that the Secretary of War "being invested with authority to dispose of it (the site) by grant in fee, all minor powers over the property are necessarily implied;" and that the railroad company, as well as the public through it, had "acquired an easement in the property, so long as it continues to use it for the purposes granted." *U. S. v. Baltimore & Ohio Railroad Co.* (1 Hughes, 138, S. C; 24 Fed. Cas., 973, 975).

Taking into consideration the language employed in the said section 169 and the rule of construction applicable to the same, I am of opinion that the power conferred thereby to lease, sell, *or otherwise dispose of* the Public Lands includes authority to grant an easement upon, over, and across them.

An easement which is granted for the purpose of erecting and maintaining a public or *quasi-public* improvement necessarily carries with it a right to remove so much of the soil, rock, and timber from the land subject thereto as may be necessary in the construction and maintenance of such improvement, but ordinarily such easement does not confer the right to indiscriminately use soil, rock and trees from adjacent lands for the purposes of construction, maintenance, and repair of such improvement.

But it is clear to me that by Sections 186 and 193 of said civil laws, the territorial officers are expressly authorized to grant a right to use earth, rock and timber upon adjacent public lands for the purpose of constructing, maintaining and repairing the improvements agreed to be erected by the applicant.

While I recognize that a "license" in its restricted legal sense, means a liberty or privilege upon the lands of another, to be enjoyed at the will of the party who gives it, and that the privilege here sought is not intended to be thus revocable, yet a license, in its enlarged sense, may include a privilege coupled with an interest, in which case it is not revocable at the will of the licensor.

This enlarged sense was evidently intended by the legislature of Hawaii to be included in the term "license" as used in the Statutes. After defining, in section 186, what a "land license" is, the legislature, by section 193, conferred upon the Commissioner of Public Lands power to make rules and regulations for the granting of the same; and in section 198, subdivision 4, recognize that contracts may be made respecting "license, or other disposition of public lands." The employment of the words "granting" and "contracts" relative to "land licenses," shows that the legislature contemplated that such licenses might be issued coupled with an interest in the grantee.

The power to grant the authority asked is conferred upon the officers of the territory by the local laws which Congress, by express direction, has continued in force, and the exercise of the power in no way depends upon the action of this department; hence, it is not necessary that the application should be approved by you.

In the application it is conditioned, among other things, that the privileges asked for, if granted, shall, within five years be surrendered to the Territory, and when surrendered be immediately issued to a corporation to be formed for the purpose of owning, maintaining and operating said works. I do not feel called upon to say whether or how such an easement or privilege as it is here sought may be transferred or conveyed to another, but I do feel constrained to say that the latter part of this provision is objectionable. The present officers cannot bind their successors or Congress in that way.

I am of the opinion, and so advise you, that the privileges requested by the applicant are within the power of the officers of the Territory to grant, and that it is not necessary for you to approve the application.

Very respectfully,

WILLIS VAN DEVANTER,
Assistant Attorney General.

APPROVED:

April 4, 1902.

(Signed) E. A. HITCHCOCK, Secretary.

The opinion mentioned in the communication from the Secretary of the Interior as rendered by the Assistant Attorney General is substantially as above recited.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, April 5, 1902.

THE GOVERNOR OF HAWAII,
Honolulu, Hawaii.

Sir:—Referring to former correspondence relating to the authority, under existing law, to grant rights of way through the public lands in Hawaii for ditches, canals, and reservoirs, to be used in the storage and conveyance of water for irrigation and kindred purposes, I enclose herewith, for your information and guidance, an opinion, dated the 4th instant, rendered by the Assistant Attorney General for this Department, approved by me, wherein it is held that, under existing legislation, such rights of way may be granted by the Territorial officers.

In this connection it should be said, that the duty and the entire responsibility of acting upon and disposing of applications for such rights of way rest upon the Territorial officers, and my duty in the premises is only of that advisory character which inheres in a superior officer. The form of agreement or arrangement with Mr. James Walter Jones, which is submitted with one of your letters, is such that I

desire to make some suggestions, born of my observation in the Department here, which may be of advantage to you and the Territory in your further disposition of matters of this kind.

It has been found necessary, if not indispensable, to the best results that there should be a prescribed width for each right of way such as ten or twenty-five feet on each side of the center line of the ditch, canal or water way, and that the taking of earth, stone and timber, for use in construction and repair, should be confined to lands embraced in the right of way, save in very exceptional instances, and then to be confined to other lands either specifically described at the time of granting the right of way or to be determined upon by public authority when the necessity therefor arises. It has been the exception, and may be of questionable propriety, to provide for the taking of timber for any purpose other than original construction, except from the lands embraced within the prescribed right of way. The sites of reservoirs should have some prescribed maximum area, and should be confined to the ground intended to be overflowed and to be a reasonable amount of adjacent ground sufficient for the proper maintenance of the reservoirs and the collection and retention of waters therein. There should be an absolutely accurate and definite location of the grounds to be included in reservoirs and dam sites and in the right of way, delineated upon some character of map to be filed within some limited time, and to be subject to the approval of the proper Territorial officer or officers. Such a map should bear upon its face, or in accompanying field notes, such a statement of the location and courses and length of the boundaries of the lands to be taken as would readily enable a surveyor to accurately mark and locate in the field the ground to be taken or affected. These matters have been found by experience to be necessary in order to distinguish and segregate the land encumbered from that

which is not encumbered, and therefore to enable the proper authorities, as well as private individuals, in subsequent dealings with respect to the public lands, to avoid conflicting grants and confusion in title. It is also common to provide that the grantees of such rights of way shall be charged with the duty of constructing and maintaining proper bridges and crossings at all intersections of public highways. Another feature common to transactions of this kind is the requirement that the dams, reservoirs, and canals, shall be constructed according to plans to be approved by some designated officer, and so maintained, under that officer's supervision, as to avoid injury to other public and private lands by reason of overflow or washing due to breaks caused by imperfect construction or careless maintenance.

Whether the rental or yearly income to the Territory indicated in the proposed agreement is an adequate one is a matter which deserves careful attention, especially considering the long period of the easement; and the Territorial officers, who are or should be, familiar with the locality and the private and public interests to be affected, are in a better position than any one here to properly determine this question.

Very respectfully,

(Signed)

E. A. HITCHCOCK,
Secretary.

APPENDIX III

71ST CONGRESS, 2D SESSION, SENATE, REPORT No. 866

Payment into Territorial Treasury of Rentals from Executive Department Lands.

May 29 (calendar day, June 6), 1930. — Ordered to be printed.

Mr. Bingham, from the Committee on Territories and Insular Affairs, submitted the following

R E P O R T

(To accompany H. R. 11134)

The Committee on Territories and Insular Affairs, to whom was referred the bill (H. R. 11134) to amend section 91 of the act entitled 'An act to provide a government for the Territory of Hawaii,' approved April 30, 1900, as amended, having considered the same, report favorably thereon and recommend that the bill do pass.

This is a bill to provide that where public lands of the Territory of Hawaii are taken for the uses and purposes of the United States and thereafter are leased, rented, or granted upon revocable permits to private corporations or individuals, that the rentals shall be covered into the treasury of the Territory of Hawaii, to be used for the purposes enumerated in the organic act.

By the organic act all the public lands of Hawaii were placed under the administration and control of the governor and the Territorial commissioner of public lands. The income of these lands goes to the Territorial treasury.

Public lands may be set aside for public purposes by an executive order of the governor of the Territory. The

President may, by Executive order, transfer public land from one department to another for public purposes.

The obvious intent of the law authorizing Executive orders is to provide departments of the Territory and departments of the Federal Government with such land and public property as may be necessary to facilitate the service of the governmental agencies. It may properly be assumed that it was not the intention of such a law to make possible the placing of valuable lands in the hands of one department, there to lie idle, unused, when by transfer to other departmental control the land would be actively devoted to a public use, either as a source of direct revenue or a saving of money through the accommodation of some branch of public service.

Under this authority, more than 160,000 acres of public land of the Territory of Hawaii have been transferred from the uses of the Territory to Federal departments. About 300 acres have been returned to the Territory by Executive order.

Summary of the lands transferred to Federal departments shows that up to June 30, 1929, there have been transferred from the uses of the Territory of Hawaii to the uses of Federal departments 163,163 acres of public lands.

Of this amount, 20,582 acres have been transferred to the War Department.

Of this acreage of 20,582 acres transferred to the War Department, the following areas, not in military use, have been leased, rented, or granted upon revocable permits to private parties:

Leased to—	Location	Acreage	Expiration date of lease	Rental
California Packing Corporation	Schofield	375.09	Jan. 1, 1933	\$4,605.75 per annum
Honolulu Planting Co.	Aiea	8.808	June 30, 1930	\$15 per acre per an.
Chock Look	Shafter	(1)	May 15, 1934	\$500 per annum
S. M. Damon estate	—do—	8.2	Aug. 19, 1932	\$21 per acre per an.
Kaneohe Ranch Co.	Kuwaaohē	300.77	Dec. 13, 1933	\$175 per annum
Waimanalo Sugar Co.	Waimanalo	229.41	Apr. 10, 1932	\$2,064.70 per annum

1 Fish pond.

The total yearly rental amounts to \$7,649.77, which sum is deposited to the credit of the United States in the United States Treasury.

The position of Governor Judd, of the Territory of Hawaii, is shown by the following:

Territory of Hawaii
Honolulu, March 7, 1930.

HON. V. S. K. HOUSTON,
Delegate in Congress from Hawaii,
Washington, D. C.

Dear Delegate Houston: In reply to your letter of February 19, 1930, inclosing copy of letter received from the Secretary of War, in which he gives the attitude of the department with respect to its leased lands in the Territory, I have given the matter considerable thought and have conferred with the commissioner of public lands on this subject.

According to your letter to the Secretary of War of October 8, 1929, the total amount of such rentals now being collected annually and paid into the Federal Treasury is \$7,649.77.

The amount of these rentals is relatively small, and I note from list of leases included in your letter of October 8, that many of the leases, including the larger ones, expire in less than two years from date, leaving a very small income unless the leases are renewed. However, whatever proceeds the Territory might derive from this source would be helpful, and if you feel that the end sought could be accomplished by an amendment to the organic act, I recommend that the attempt be made.

Yours respectfully,

LAWRENCE M. JUDD,
Governor of Hawaii.

The War Department's attitude is given in the following:

War Department,
Washington, D. C., February 14, 1930.

HON. V. S. K. HOUSTON,

House of Representatives, Washington, D. C.

Dear Mr. Houston: Replying to your letter of January 28, 1930, permit me to advise you that it is essential that the War Department retain control of its leased lands in Oahu.

Although War Department lands may be leased to private control under the act of July 28, 1892 (27 Stat. 321), this is a temporary condition since all leases provide that they may be revoked at the discretion of the Secretary of War, thus making the lands available on a short notice.

Should these lands be transferred by Executive order to the Territory of Hawaii, with the provision that they be given back to the War Department when needed, and then leased to private control, which is the object of the Territory in obtaining the lands, the War Department could not secure the lands for military use during the life of the lease, since section 73 (d) of the organic act provides that agricultural lands leased by the Territory may only be revoked for homestead or public use.

Under the present law as expressed by section 3621 of the United States Revised Statutes, all funds derived from rental of War Department lands must be deposited in the Treasury of the United States. The War Department has no option in this matter, but after the funds have been deposited in the general fund of the Treasury there may be a method or procedure by which the Treasury Department can deposit the money to the credit of the Territory of Hawaii. This is a matter of bookkeeping within the Treasury Department. If no such procedure exists, it appears that the proper recourse is for you to secure congressional action by having the joint resolution to provide for annex-

ing the Hawaiian Islands to the United States, approved July 7, 1898, modified to provide that funds derived from the rental of any of the excepted lands mentioned therein, shall be deposited to the credit of the Territory of Hawaii.

The War Department will not oppose this action.

Sincerely yours,

PATRICK J. HURLEY,
Secretary of War.

The Secretary of the Interior's approval is given in the following:

Department of the Interior,
Washington, April 1, 1930.

HON. CHARLES F. CURRY,
Chairman Committee on the Territories,
House of Representatives.

My Dear Mr. Chairman: Referring further to your request of March 27 for a report on H. R. 11134, which would amend the act of April 30, 1900, providing for a government of the Territory of Hawaii, I have to inform you that, in my judgment, the passage of this bill would be in the interest of good administration. Its favorable consideration is therefore recommended.

Very truly yours,

RAY LYMAN WILBUR, Secretary.

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APPENDIX IV

61ST CONG. 2D SESS. H. R. REPORT No. 910

Amending Organic Act of Hawaii.

March 30, 1910.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. Hamilton, from the Committee on the Territories, submitted the following

 R E P O R T

(To accompany S. 3360.)

The Committee on the Territories, to whom was referred the bill (S. 3360) to amend an act entitled 'An act to provide a government for the Territory of Hawaii,' approved April thirtieth, nineteen hundred, having had the same under consideration, report it back with the recommendation that it do pass, with amendments as follows: [Amendments then are reported, including the insertion of a proposed section 7, amending section 86 of the Organic Act which section subsequently was dropped. However this proposal caused the section amending section 91 of the Act to be referred to in this report as section 8; as finally enacted it was section 7 of the bill.] * * * *

* * * *

Section 8 of the bill amends section 91 of the organic act, which provided that the public property ceded to the United States upon annexation remains in the control of the Territory, subject to the power of the President or the governor to set aside portions of it from time to time as required for the uses and purposes of the United States. The real property may be sold or leased by territorial officers under the Hawaiian laws, which were continued in

force by sections 73 and 75 of the organic act, and the personal property may likewise be sold or leased by territorial officers under the authority of the act of May 26, 1906 (34 Stats., 204), and the proceeds of all such sales and leases go into the Hawaiian treasury. In other words, all such property now belongs practically or equitably to the Territory, except that the technical or legal title is in the United States and needed portions may be set aside by the President or the governor for the use of the United States. This section is amended principally in three respects.

(1) In some cases property has been set aside by the President as a matter of precaution on the chance that it might afterwards be found to be needed by the Federal Government, but has since been found not to be needed; or property that has been so set aside has been found to be needed only temporarily. The proposed amendment permits such property to be restored to its previous status, but only by the President.

(2) At present the Territory has public schools and other public buildings and works, upon lands the title to which is technically in the United States; it is constantly expending money on these in repairs, additions, and new buildings and works. It is also constantly constructing new buildings and works on lands hitherto unused. It seems only right that the Territory should have the title to the lands upon which it expends its money for public improvements. The proposed amendment permits the President to transfer to the Territory such public property as is now used or money hereafter to be required by it for public purposes.

(3) As local governments are established and developed such public property as may be needed for the exercise of their functions should be turned over to them. The amendment permits this to be done by the governor when authorized by the legislature.

At present there is more or less confusion. In many cases, for instance, the title is in the United States, the

responsibility of the care and management is in the Territory, and the actual possession and use is in the city or county government. The amendment will make it possible to remove all confusion and put things on a business like basis.

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APPENDIX V

79TH CONG. 2D SESS. HOUSE OF REP. REPORT No. 2462

Amending paragraph (L) of section 73 of the Hawaiian Organic Act, as amended

July 8, 1946.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed.

Mr. Larcade, from the Committee on the Territories, submitted the following

R E P O R T

(To accompany H. R. 3361)

The Committee on the Territories, to whom was referred the bill (H. R. 3361) to amend paragraph (l) of section 73 of the Hawaiian Organic Act, as amended, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

On page 2, line 2, insert, between the words 'to' and 'the', the words 'war or'.

On page 2, at the end of line 2 and the beginning of line 3, omit the words 'or the prosecution of the present war'.

The purpose of this bill is to amend section 73 (l) of the Organic Act of the Territory of Hawaii so that in cases where purchasers of land are unable to fulfill all of the

conditions of the purchase, for reasons relating to the prosecution of the war or national defense, they shall not forfeit said lands and shall be allowed an extension of the period during which any of the conditions of the sale of said lands may be complied with that is equal to the period in which they had been prevented from meeting these conditions so as to relate only to national defense and the prosecution of the present war. It has been amended so as to retain the same reference to national defense but eliminates the limitations as to 'the present war'.

The measure is presented therefore to provide authority to meet problems that might very readily arise in the future in view of the great military importance of the islands of the Hawaiian group.

The bill is the outcome of a situation that exists as a direct result of the war.

The Territory of Hawaii, acting under authority of the organic act, sold a piece of land in the industrial area of Honolulu to one of the large canning companies under the condition that within a specified period a warehouse would be constructed on this property. The company fully intended to carry out this condition of purchase but was prevented from doing so by the outbreak of war. The land was taken over by the United States for storage space and, in consequence of this and conditions resulting from the war, the company was unable to proceed with the construction of the warehouse.

The enactment of this legislation would protect purchasers in their title to lands in purchases of this kind and would moreover assure the Territory that the conditions of the sale would be carried out in the proper time.

The legislation has the approval of the administrative officials of the Territory of Hawaii.

It is recommended, with the amendments, by the Acting Secretary of the Interior, in a letter dated December 14,

1945, addressed to the chairman of the Committee on the Territories, as follows:

Department of the Interior,
Washington, December 14, 1945.

My Dear Mr. Peterson: Reference is made to your request for a report by this Department on H. R. 3361, a bill to amend paragraph (1) of section 73 of the Hawaiian Organic Act, as amended.

The proposed legislation would assure purchasers under the Hawaiian Homes Commission Act that, in cases where covenants or conditions contained in their grants have been, or may be rendered impossible of fulfillment by reason of privileges granted to the United States for war or defense purposes, the failure to comply will not result in forfeiture and that their time to satisfy such covenants or conditions will be appropriately extended.

Although there is an inconsistency, apparently inadvertent, in the bill, if corrected as herein suggested I would recommend its favorable consideration by your committee.

The rights of these purchasers should not, of course, be jeopardized because of their patriotic cooperation with the Federal Government during a war or defensive emergency. However, the diversions of use listed as excusing a failure to perform the conditions of a grant are those 'relating to the national defense or the prosecution of the present war.' It is to be noted that, while the war referred to is 'the present war,' no such limitation is placed upon the period of 'national defense.' Accordingly, H. R. 3361, if enacted, would excuse nonperformance in the future based upon the necessities of the national defense but not upon the prosecution of a war. If you agree that the proposed legislation should not be so limited, this limitation could be removed by inserting, between the words 'to' and 'the' on page 2, line 2, the words 'war or', and by omitting, on the

same page at the end of line 2 and the beginning of line 3, the words 'or the prosecution of the present war'.

Due to my understanding that a hearing on this bill has been scheduled by your committee for December 14, this letter is being sent to you prior to its submission to the Bureau of the Budget, and, therefore, I have not been advised by that agency concerning the relationship of the views expressed herein to the program of the President.

Sincerely yours,

ABE FORTAS,
Acting Secretary of the Interior.

Hon. Hugh Peterson,
Chairman, Committee on the Territories,
House of Representatives.

* * * * *

The bill which was the subject of this report became the Act of August 7, 1946, reading as follows:

Public Law 616, 79th Cong. 2d Sess. (H. R. 3361),
59 Statutes at Large c. 771.

AN ACT

To amend paragraph (1) of section 73 of the Hawaiian Organic Act, as amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That paragraph (1) of section 73 of the Hawaiian Organic Act, as amended, is amended by inserting before the period at the end thereof a colon and the following: 'Provided further, that in case any lands have been or shall be sold pursuant to the provisions of this paragraph for any purpose above set forth and/or subject to any conditions with respect to the improvement thereof or otherwise, and in

case any said lands have been or shall be used by the United States of America, including any department or agency thereof, whether under lease or license from the owner thereof or otherwise, for any purpose relating to war or the national defense and such use has been or shall be for a purpose other than that for which said lands were sold and/or has prevented or shall prevent the performance of any conditions of the sale of said lands with respect to the improvement thereof or otherwise, then, notwithstanding the provisions of this paragraph or of any agreement, patent, grant, or deed issued upon the sale of said lands, such use of said lands by the United States of America, including any department or agency thereof, shall not result in the forfeiture of said lands and shall result in the extension of the period during which any conditions of the sale of said lands may be complied with for an additional period equal to the period of the use of said lands by the United States of America, including any department or agency thereof.'

Approved August 7, 1946.







